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101st Congress
1st Session

SENATE

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101-4

IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

MOTIONS OF JUDGE ALCEE L. HASTINGS TO DISMISS ARTICLES I-XV AND XVII OF THE ARTICLES OF IMPEACHMENT AGAINST HIM AND SUPPORTING AND OPPOSING MEMORANDA

Printed at the direction of WALTER J. STEWART, Secretary of the Senate, pursuant to S. Res. 39, 101st Cong., 1st Sess. (1989)

FEBRUARY 2, 1989.—Ordered to be printed

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TABLE OF CONTENTS

	Page
1. S. Res. 39, 101st Cong., 1st Sess. (1989)	1
2. Motion of Judge Alcee L. Hastings to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time	3
3. Memorandum in Support of Motion of Judge Alcee L. Hastings to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time	5
4. Motion of Judge Alcee L. Hastings to Dismiss Article XVII	98
5. Executive Summary: Response of the House of Representatives to Respondent's Motions to Dismiss	107
6. Response of the House of Representatives to Respondent's Motion to Dismiss Articles I–XV	119
7. Response of the House of Representatives to Respondent's Motion to Dismiss Article XVII	197
8. Judge Hastings's Reply to the Responses of the House of Representatives to Respondent's Motions to Dismiss Articles I–XV and Article XVII	205

S. Res. 39, 101st Cong., 1st Sess.

RESOLUTION

To provide for the filing and argument of motions by Judge Alcee L. Hastings to dismiss articles of impeachment.

Resolved, That on a date designated by the Majority Leader in consultation with the Minority Leader, the Senate shall resume its consideration of the articles of impeachment against Judge Alcee L. Hastings for the purpose of hearing argument on a motion or motions by Judge Hastings to dismiss the articles.

SEC. 2. Counsel for Judge Hastings shall file with the Secretary of the Senate on or before February 10, 1989, any motion to dismiss the articles of impeachment. The Managers on the part of the House shall file with the Secretary on or before February 24, 1989, their response to any such motion. Counsel for Judge Hastings may file a reply with the Secretary on or before March 3, 1989.

SEC. 3. There shall be printed as one of several Senate documents under the direction of the Secretary of the Senate, in consultation with the Senate Legal Counsel—

(1) the briefs of the parties on any motion to dismiss the articles of impeachment; and

(2) material that would assist the Senate in the consideration of any such motion, including the articles of impeachment, Judge Hastings' answer to them, the replication of the House of Representatives, the provisions of the Constitution on impeachment, and the Rules of Procedure and Practice in the Senate When Sitting on Impeachment Trials.

SEC. 4. The Secretary shall notify the House of Representatives and counsel for Judge Hastings of this resolution.

In the Senate of the United States

Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, PLAINTIFF,

v.

THE HONORABLE ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MOTION TO DISMISS ARTICLES I THROUGH XV WITHOUT TRIAL BASED ON 1983 JURY VERDICT AND LAPSE OF TIME

Respondent United States District Judge Alcee L. Hastings moves that the Senate of the United States enter an order dismissing the first fifteen articles set forth in the Articles of Impeachment exhibited against him by the plaintiff House of Representatives of the United States with prejudice and without trial or further proceedings. The principled grounds that justify and require this relief are developed in the *Memorandum in Support of Motion to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time* that accompanies this motion.

Respectfully submitted,

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In the Senate of the United States

Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, PLAINTIFF,

v.

THE HONORABLE ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARTICLES I THROUGH XV WITHOUT TRIAL BASED UPON 1983 JURY VERDICT AND LAPSE OF TIME

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CONTENTS

	Page
I. Introduction and Summary	9
II. Statements of Facts	17
A. Events that Preceded the Trial	17
1. Background	17
2. The *Romano* Case	23
3. "Operation Apple Eye": The Undercover Investigation	27
B. The Indictment and Trials	33
1. The *Borders* Trial and Conviction	34
2. The *Hastings* Trial and Acquittal	35
C. The Post-Acquittal Investigation	42
1. The Judicial Investigation	42
2. The House Inquiry	47
III. The Constitutional Principles and Their Application	48
A. Fundamental Fairness to the Accused Requires that the Articles Be Dismissed	48
1. The Constitution, its History, the Framers' Intent, and Established Jurisprudence are Clear: Double Jeopardy Applies and Bars a Second Trial of An *Acquitted* Judge on Accusations That a Jury Rejected	48
2. The Lapse of More Than Six Years Has Irretrievably Prejudiced the Judge's Right to a Fair Trial, and the Requirements of Fairness Mandated by the Due Process Clause Confirm That These Accusations Must Be Dismissed	66

Page

B. Seven Years of Investigation and More Than Two Million Dollars is Too Much: Reprosecution of Accusations a Jury Rejected More than Six Years After the Fact Cannot be Reconciled with the Guarantees Established to Maintain the Necessary Judicial Independence 75

1. The "New" Precautions for Maintaining Judicial Accountability That Have Been Implemented Over the Past Fifty Years Enhance the Senate's Role and Responsibility as the Final Guarantor of Judicial Independence 75

2. The Articles Must be Dismissed to Reassure Judges and Remind Officers in All Three Branches That Seven Years is Too Long, That Two Million Dollars is Too Much, and That One Trial is All the Constitution Permits 79

IV. Conclusion 82

Addendum:

A. Indictment, *United States v. Hastings* (Counts I and II) (the accusations against Judge Hastings which were made in 1981 and tried in 1983) 87

B. Specific Proffer Regarding Fundamental Fairness Questions: Thomas G. Krattenmaker, Professor, Georgetown University Law Center (proffer submitted at invitation of House Subcommittee on Criminal Justice on June 16, 1988) 93

In the Senate of the United States

Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, PLAINTIFF,

v.

THE HONORABLE ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS ARTICLES I THROUGH XV WITHOUT TRIAL BASED UPON 1983 JURY VERDICT AND LAPSE OF TIME

I. INTRODUCTION AND SUMMARY

The House of Representatives should not be permitted to impose the burdens of a trial on the first fifteen Articles of Impeachment upon either Judge Hastings or the Senate. The central allegations made in those articles—that Judge Hastings participated in a corrupt conspiracy in 1981 (Article I) and that he presented false testimony and fabricated evidence at his trial in 1983 (Articles II through XV)—were submitted to and rejected by the jury at that trial.

Cases of impeachment were criminal cases in England, and the framers intended that they be so viewed under our Constitution. The framers considered the application of double jeopardy principles in cases of impeachment and concluded that only a limited exception was warranted—an exception for a *"party convicted."* They made no exception for a *party acquitted.* The members of the First Congress again considered the ap-

plicability of those principles when they debated proposals for a bill of rights. Madison proposed and the House recommended that "Cases of Impeachment" be excepted generally from the protections afforded by double jeopardy principles. The Senate rejected the House's recommendation. The House receded, and the exception was deleted from the Bill of Rights that became part of the Constitution. Under any fair reading of the Constitution, its history, and the principled jurisprudence of its implementation, the jury's verdict alone bars a retrial before the Senate on the allegations made in the first fifteen articles.[1]

That verdict does not stand alone, however. The 1981 allegation that the judge was a participant in a corrupt conspiracy and the 1983 allegations that the judge had perjured himself at trial accused him of conduct that constituted high crimes under the impeachment standard as well as under statutory standards. The allegations and the record necessary to assess the need for further inquiry were complete and available to all by February 1983, at the latest.

More than five years elapsed between the end of that trial in February 1983 and the House's decision to resubmit those allegations to the Senate in August 1988. In the interim, records had been destroyed, witnesses had died, and recollections had dimmed or, worse, been manipulated beyond repair or fair assessment. The

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[1] The principled jurisprudence is to be found in the Supreme Court's decisions establishing that the prohibition against placing an accused twice in jeopardy of a trial for the same offense is so fundamental to the scheme of Anglo-American jurisprudence that its observance is one of the requirements of fundamental fairness mandated by our commitment to due process. The policies that have governed the application of this principle in other contexts confirm its applicability here. These points and the supporting authorities are developed below at 48–66.

lapse of time and the events that have intervened invoke additional constitutional principles that confirm that a trial before the Senate in 1989 would conflict with the requirements of fundamental fairness mandated by the Constitution.[2]

The concerns go beyond fairness to the accused official as an individual. The Constitution sought to protect judicial independence by guaranteeing to every federal judge secure tenure and compensation that could not be diminished in office and by assigning the sole powers by which that security could be challenged and terminated to the House and the Senate, respectively. The policies that led the framers to insist upon those guarantees and to specify that allocation of powers had objectives similar to those that underlie the constitutional prohibitions against double jeopardy and improper delay. They were intended to restrict the *means* by which a judge's security in office could be undermined, without regard to the legitimacy of the *end* sought. They were adopted to assure the people that every judge would enjoy extra protection from the exercise of discretionary powers by government officials in order that each might act with the necessary independence. Those policies and the conditions necessary to maintain them confirm that, when the accused in a case of impeachment is a judge, the Constitution requires that the protections accorded the accused judge be measured against a higher, not a lower, standard than that mandated by the Due Process Clause for all accused citizens.

Officials in all three branches of government have now spent more than seven years investigating and reinvestigating the allegations against Judge Hastings, without regard for the extraordinary economic and psy-

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[2] These points and the supporting authority are developed below at 66–75.

chological burdens that their actions have imposed upon the judge and his office. The government has expended more than two million dollars on the post-acquittal investigations, just on costs and special staff alone. Those six years of post-trial investigations have produced no material evidence *against* the judge that was not available to the prosecutors before the 1983 trial, and the case against the judge remains now as it was then—circumstantial.

These facts make it clear that something is wrong. Seven years is too long; two million dollars is too much; and one trial was enough. One need not here question the legitimacy of the *end,* or the motives of those who claim to seek it in this case, to conclude that the *means* employed have far exceeded the bounds established by the Constitution. If what has been done to Judge Hastings were proper, then every judge must preside knowing that the same powers and procedures may be exercised against him or her also. There may be those who see nothing wrong in this and who see the end they seek in this case as adequate justification for the means that have been employed for the past seven years. The framers, however, viewed the matter differently, and the people adopted their view when they adopted the Constitution.

The Senate cannot, in this proceeding, redress the wrongs that have been done to Judge Hastings; it can, however, by its decision on this motion, send officials in all branches of government a clear message: Never again. That message is necessary to reassure other federal judges and to remind other federal officials that the Constitution struck a balance between the ends of judicial independence and accountability—a balance that limits the means that may be used in order that judges may "be protected against those who would

make them afraid," [3] and a balance that must be respected by all concerned. A decent respect for the Constitution and the system of government it established demands that that message be sent.[4]

We develop these points and demonstrate their proper application in this case below. The House has, however, framed the allegations in these articles and in published reports that have led some commentators to conclude the allegations are significantly different from those presented at the 1983 trial and that significant evidence, which had not been available to the prosecutors at that time, has since been discovered. Were that true, the issues that the Senate would confront would be somewhat different.[5] It is not.

The basic facts may be simply stated. By 1981, Judge Hastings had established himself as an able, young trial judge in the busiest district court in the nation. He had an established reputation for honesty and integrity of the highest order and was known as a man whose judicial salary was more than adequate to satisfy the modest fiscal needs required to maintain his established

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[3] That was the position taken by the House in an earlier day: "We take the position, first, that justice must be done to the respondent. The respondent must be protected against those who would make him afraid." *Proceedings of the United States Senate in the Trial of Impeachment of Halsted L. Ritter,* S. Doc. No. 200, 74th Cong., 2d Sess. 610 (1936) (closing argument of the Hon. Hatton W. Sumners, Chairman of the House Committee on the Judiciary, as a Manager for the House).

[4] These points and the supporting authorities are developed below at 75–81.

[5] The Senate would then have to conduct additional hearings before the trial in order to resolve any factual disputes necessary to enable it to determine the extent to which the allegations made in the articles were litigated at trial and whether there is any material new evidence that was not reasonably available to the prosecutors at that time.

lifestyle. His commitment to liberal values informed his work as a judge, and he continued to be an outspoken advocate off the bench on issues that he deemed important. He had remained active in the affairs of his profession, at the local, state, and national levels, and in civic and community organizations. Within the South Florida community, he was viewed as a charismatic black leader whose rise to prominence and high office symbolized the possibility of progress towards racial equality.

Until his arrest in October 1981, the career of William Borders evidenced similar success. He had been elected president of the National Bar Association. He had risen to prominence in the Democratic Party and had served as an advisor on minority issues to high ranking officials in the Carter administration, particularly in their quest to appoint qualified minorities to the federal bench. Among his professional and political associates, he had apparently enjoyed a universal reputation as a man of ability and unquestioned integrity.

As the trial judge noted, *after* Borders's conviction, there was another William Borders, one that he had successfully concealed from his friends and political and professional associates. That was the secretive and manipulative Borders who had held himself out among criminal associates as having the power to fix cases before selected federal judges by soliciting bribes. It was that Borders who made the representation to an undercover agent posing as one of the Romano brothers, who were the defendants in a criminal case pending before Judge Hastings. It was that Borders who set out to manipulate events to persuade that "defendant" that his power over the judge was real in order to extract $150,000 as a "bribe." The evidence of Borders's enthusiastic participation in the corrupt scheme was clear.

From the day of Borders's arrest, Judge Hastings maintained that he, like everyone else, had been deceived by Borders. He maintained that he was the victim of a corrupt scheme embarked upon by the "other" Borders, the Borders who would trade upon his friends and sell his own integrity if the price was right. The central issues were thus apparent from the outset. Were the events and contacts between the two men that the government proffered as evidence of the judge's participation products of Borders's corrupt manipulation and coincidence, or did they show that there was also an Alcee L. Hastings other than the one who had established an unblemished record for honesty and integrity over more than fifteen years of dedicated service to his community and his profession? Did the innocent explanations that the judge provided for the events and contacts establish his claim of innocence, or was his testimony false, as the prosecutors argued, and thus further evidence corroborating his guilt?

At trial, the prosecutors chose to rely primarily upon the events and contacts that had occurred between September 10 and October 9, 1981, during the period of their undercover operation, to establish the judge's guilt. It was clear that those events and contacts were also consistent with the pattern of innocence provided by the judge's testimony, the view the jury accepted when it rejected the government's claims and returned its verdict.

In the post-acquittal investigations, the judge's accusers have reexamined those events and other events and contacts that occurred in 1981. In all, more than 150 witnesses have testified, and thousands of pages of long-distance telephone bills, message pads, diaries, court records, and other documents have been examined. The most telling result of that inquiry is that, after seven years of investigation with seemingly unlimited re-

sources, the judge's accusers still have no direct evidence of the judge's involvement *in any activity* that is not fully consistent with his established reputation as a man of principle and integrity.

Nonetheless, these accusers now claim that the tea leaves of circumstances, as they have repackaged them, support anew their claims that the judge was involved in Borders's corrupt 1981 scheme and that the explanations provided by the judge's testimony at the 1983 trial were false. It is also clear from the expanded record, however, that the events and contacts can be viewed as establishing, even more firmly, a pattern that supports the judge's claim that he was the innocent victim of Borders's corrupt scheme, a pattern that is fully consistent with the testimony he gave at trial.

Circumstantial cases such as this are, in their nature, cases that can never be resolved with certainty, only with finality. Against that background, the question posed by these motions is whether it is consistent with established constitutional principle or sound constitutional policy for the Senate to conduct and impose upon Judge Hastings and itself the burdens of a protracted second trial to determine whether its members can see now in the tea leaves of circumstance a pattern so clear as to justify now repudiating the verdict the jury reached six years ago. We submit that it is not.

In order to establish the foundation for that conclusion, we have summarized the protracted proceedings that have taken place and the voluminous records that have compiled over the past seven years with some specificity. That summary provides the background that may be necessary for those whose assessment of the principles and their proper applications requires that

they understand the factual contentions in some detail.[6] For others, the principled grounds that require dismissal are developed in part III below (at 48–81), and they will be enough.

II. STATEMENT OF FACTS

A. EVENTS THAT PRECEDED THE INDICTMENT

1. Background

The 1983 trial and the investigations that preceded and followed that trial focused upon events in 1981 that involved four men—Judge Hastings, William Borders, Hemphill Pride, II, and, to a lesser extent, Jessie McCrary, Jr. They also focused upon the relationships among these men. The record to date does not reveal any significant dispute over the background necessary

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[6] The summary also serves two additional purposes that should be noted here. First, the political nature of the impeachment process required that the House Committee on the Judiciary publish a similarly detailed summary of its view of the evidence in order to support the recommendations it submitted to the House. *See* House Comm. on the Judiciary, *Impeachment of Judge Alcee L. Hastings,* H.R. Rep. No. 810, 100th Cong., 2d Sess. 13–31, 41–56 (1988) (*"House Comm. Rep."*). Fairness requires that a similarly detailed view of the evidence, from the standpoint of the accused, be available for Senators and others who care. Second, a Senate decision that, in the event a trial is necessary, evidence should be presented before a Rule XI committee is likely to deprive most Senators of the orientation usually provided by the parties' opening statements. The summary provided here may partly redress that deficiency.

We recognize that the records necessary to verify most of the facts reported here are not before the Senate, and for that reason, we adopt the style used by the House Judiciary Committee in its report. We do proffer that the statement is fully and fairly supported in the records compiled by the House and made available to us. Consistent with the view of acceptable procedure taken by the House, we are confident that its managers will note any objections to the facts presented and identify the basis therefor.

to understand the 1981 events as they bear upon the pending motions.

a. Alcee L. Hastings. Judge Hastings attended Florida's then-segregated law school at Florida A & M University. Hemphill Pride, II, was one of his five classmates, and the two men became roommates. Jessie McCrary, Jr., was a first year student during Pride's and the judge's last year in law school and met both men at that time. Judge Hastings graduated in 1963 and established his office in Ft. Lauderdale, Florida.

During the thirteen years following his graduation, Judge Hastings engaged in an active trial practice in civil, criminal, and civil rights matters. He became a political activist within the state Democratic Party and within his local community. He was also an active participant in the affairs of his profession, in the American and National Bar Associations, as well as in the Florida Bar. His relationship with Borders developed through their shared activities in the NBA and in Democratic politics.

By 1977, Judge Hastings had established himself as a charismatic political figure, a civic activist, and an able trial lawyer. His political and civic activities and the nature of the clients he chose to serve limited his income, but all concede that his needs appeared modest and his means adequate. After then-Governor Askew appointed him to be a judge of the state trial court in 1977, Judge Hastings promptly established himself as an able trial judge, but one who would remain an outspoken advocate off the bench on issues he deemed important.

In 1979, President Carter nominated Judge Hastings to become the first black to serve on the federal court in the Southern District of Florida. The rigorous FBI examination that followed confirmed the judge's essential characteristics as a man of integrity, competence, and

ideals and as an outspoken public advocate. Following confirmation by the Senate, President Carter made the appointment. The judge took office on October 22, 1979.

Judge Hastings assumed the imposing duties of a judge on that court and executed them fully. Among the lawyers who tried cases before him, whether on behalf of the government, plaintiffs, or defendants, he established himself as a scrupulously fair and effective judge, who retained his sense of humor and his respect for practicing attorneys, while maintaining appropriate control over the courtroom. At the same time, he retained the vision and understanding of the Constitution and laws of the United States that he had developed over the years and exercised the judicial power accordingly, irrespective of the parties or the stakes. His views were less popular among higher ranking politically appointed and career attorneys for the federal government.

Judge Hastings also continued to engage in extensive non-judicial activities, as he had while he was a state court judge. He continued to speak publicly on issues of concern on which he thought he had something to say. He regularly lectured from the pulpit to church groups; in secondary schools, colleges, and law schools to students; and at meetings and conferences of lawyers and others around the country. He remained active in bar groups. He served on the American Bar Association's Standing Committee on Professional Discipline and became a committee chair in the Judicial Council of the National Bar Association. He continued to serve on the boards of foundations, colleges, and other civic and educational organizations. Among his established and natural constituencies, he expanded his reputation as a charismatic speaker and dynamic symbol. It seems clear that some of his more staid counterparts were bothered

by the outspokenness of the liberal judge who had joined their ranks.

b. William A. Borders. William Borders graduated from Howard Law School and entered practice as a criminal defense lawyer in Washington. He became active in the Democratic Party and in the National Bar Association. By the late 1970's, he had gained national prominence. He had played a prominent role in the campaign to elect President Carter and had become a member of the Democratic Party National Committee and of its finance committee. He had also become one of the principal advisors to Attorney General Bell and President Carter in the quest to find minority lawyers qualified to serve on the federal bench. He had become a partner in a small, prestigious, black law firm in Washington. In 1980, President Carter appointed him to serve on the Judicial Nominations Commission for the District of Columbia.

The record does not reflect what role Borders may have played in President Carter's decision to nominate and appoint Judge Hastings to the federal bench. By 1979, both men had become prominent in the NBA and in Democratic Party politics and knew each other well. Those who testified at Borders's trial did confirm the extent of his influence among senior officials in the Carter administration and campaigns, and Borders is reported to have bragged to some associates and clients about the number of judges he had "made".

By all accounts, there was another side of William Borders. According to all who knew him, Borders had an extraordinary penchant for secretiveness. With clients and friends alike, he would insist that they converse in the alley behind his office rather than in the office itself. He was cryptic in his conversations: Talking to Borders was "not like talking to a normal human being," in the words of the government's principal in-

formant. In transacting ordinary business, even with other attorneys and prominent politicians, he used and asked others to call him at or from public pay phones rather than using the telephones in his office. He apparently delighted in appearing clandestine and mysterious, appearing when he was not expected, not appearing when he was. At the same time, Borders routinely insisted upon personally meeting important out-of-town friends at the airport, chauffeuring them about, and serving as a host when they were in Washington. His clients, business associates, and political acquaintances noted these characteristics, but everyone appears to have seen them as tolerable eccentricities and not as causes for suspicion.

c. Hemphill Pride, II. After graduation from law school, Hemphill Pride returned to his home in Columbia, South Carolina, and established a practice as a criminal defense lawyer. By all accounts, he was rather successful. Pride also became involved in real estate. He became the owner of a fifty-five unit, six-story housing project in Columbia. In connection with that undertaking, he received a federally subsidized loan for $810,000. There are strong suggestions in the record that Pride encountered serious financial difficulties in the early 1970's.

In any event, by 1976 his circumstances were such that he began misappropriating funds from his federally financed housing project. On October 11, 1977, the United States filed an indictment that charged Pride with willfully misusing rents and other funds from the project in violation of federal statute and regulation. On December 16, 1977, he was convicted of ten counts of criminal misuse of funds. Pride was thereafter sentenced to a three-year term of imprisonment, and he appealed.

At the time of his indictment, Pride turned to Borders for assistance. Pride had apparently met Borders through the NBA and become impressed with his political savvy and experience. It was through Borders that Pride retained John Shorter, the lawyer who ultimately represented him at trial. Pride also turned to Borders for assistance after his conviction. While Pride's appeal was pending, Borders supplied him with a rent-free apartment and found him a job in Washington, D.C. According to Pride, Borders was his principal confidant and advisor during this period.

Pride's financial straits became apparent and increased during this period. He was suspended from practice pending disposition of his appeal and divorced from his first wife. Judgments evidencing unpaid liabilities approaching $150,000 were entered against him. Given the circumstances and Pride's description of their relationship, it seems certain that Borders must have known with some precision the full extent of Pride's financial and legal problems and of Pride's consuming desire eventually to return to the practice of law.

Judge Hastings and Pride had remained close friends since law school days. Both confirmed that the judge had long referred to him by the nicknames "Hemp" or "Hempie". Judge Hastings and Pride each acted as godfather to the other's son. Wisely or not, Judge Hastings's maintained the friendship after he assumed the federal bench, notwithstanding Pride's then troubles. Given that friendship, Judge Hastings must have known the general extent of Pride's legal and financial problems and of his consuming desire to regain his license. These are conclusions that Pride largely admitted. In any event, Pride's appeals failed, and he entered prison in March 1980.

d. Jessie McCrary, Jr. Jessie McCrary played peripheral roles in the events that gave rise to the proceedings

against Judge Hastings. Nevertheless, those events and McCrary's credibility became significant at the trial and during the subsequent proceedings, and thus some description of the man and his prior relationships with Judge Hastings, with Pride, and with Borders will aid in understanding the events as they unfolded.

After he graduated, McCrary clerked in Judge Hastings's law office until he was admitted to the bar. Thereafter, he, like Judge Hastings, established his own general practice, primarily in civil litigation. McCrary also became active in civil and political affairs. His reputation and stature as a public citizen and a lawyer were marked by two gubernatorial appointments, the first to serve as a judge of Florida's Industrial Relations Commission and the second to fill a vacancy in the cabinet as Florida's Secretary of State.

Throughout, Judge Hastings and McCrary maintained a close social relationship as well as the political and professional relationships dictated by their common interests and activities. Through the National Bar Association, McCrary also maintained his relationship with Pride and developed a relationship with Borders.

2. The Romano Case

On December 23, 1980, a jury found Thomas and Frank Romano guilty on all counts of a twenty-one count indictment. The indictment had charged the Romanos with violations of the Racketeer Influenced and Corrupt Organization Act. The government claimed that cash proceeds amounting to $846,000 and that property interests in a motel and certain real property valued at $316,000 were subject to forfeiture under the RICO Act. By agreement of the parties, the forfeiture issues were tried before Judge Hastings, sitting without a jury. On May 4, 1981, Judge Hastings adopted the gov-

ernment's position and entered judgment declaring both the cash proceeds and the property interests forfeit.

The Romanos filed post-trial motions seeking a new trial or judgments of acquittal notwithstanding the verdict. They later filed a motion asking the court to reconsider its forfeiture judgment. On June 19, 1981, while those motions were pending, the circuit court of appeals issued its opinion in *United States v. Martino.*[7] That court adopted precedents from other circuits and ruled that income and receipts from racketeering were not subject to forfeiture under the RICO Act. The prosecutor brought the *Martino* decision to the court's attention and tacitly conceded that its application would require that the cash proceeds portion of the forfeiture judgment be set aside. He argued, however, that *Martino* was wrongly decided and should not be applied, even though it constituted the law of the circuit and precedent binding on Judge Hastings's court.

On July 8, 1981, Judge Hastings heard argument on the Romanos' post-trial motions, their motion to reconsider the forfeiture judgment, and the question of the sentences to be imposed. He denied the post-trial motions and sentenced each of the Romanos to a three-year term of imprisonment. He announced his intention to adhere to the forfeiture judgment, notwithstanding *Martino,* but added that he would issue an order explaining the basis for his decision.

After the hearing, Judge Hastings assigned the task of preparing the order to Jeffrey Miller. Judge Hastings had hired Miller to serve as one of his law clerks for a one-year period beginning October 1, 1980. Miller has assumed responsibility for the *Romano* file at that time

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[7] 648 F.2d 367 (5th Cir. 1981). At that time, the division of the Fifth Circuit had not become effective, and Fifth Circuit decisions were binding on federal courts in Florida.

and had briefed the judge on the *Martino* opinion and the parties' positions shortly before the July 8 hearing. Miller testified that, after that hearing, he understood that the judge wanted to stand by the original forfeiture judgment, but only if that decision could be justified under the law. According to Miller, he was unable to distinguish *Martino* effectively, but he did prepare an extensive draft order that identified a possible distinction and that called for further briefs. Miller did not submit that draft to Judge Hastings, however, because emergency matters arose in other cases on which Judge Hastings required his assistance in August.

On August 27, 1981, the circuit court of appeals decided *United States v. Peacock.*[8] In *Peacock,* the court of appeals summarily reversed a district court order that had included profits in a judgment of forfeiture under the RICO Act. The *Peacock* decision relied solely upon *Martino* as adequate authority for its summary reversal.

Miller reported that he promptly brought *Peacock* to Judge Hastings's attention and told him, "The court of appeals has followed *Martino.* Better give them [the Romanos] their money back." According to Miller, Judge Hastings promptly responded, "Give them the money," but instructed him that the order should make clear that Judge Hastings disagreed with the law of the circuit that he was applying. By all accounts, this conversation occurred *prior* to September 10, 1981.

According to Miller, he began work on the opinion, but did not again discuss the case with the judge until early October. Earlier in the year, Miller had accepted a new one-year position as a clerk to the Honorable James C. Paine, another judge on the same court. He had agreed to start on October 1, 1981, but Judge Hast-

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[8] 654 F. 2d 339 (5th Cir. 1981); *see* note 3 *supra.*

ings had intervened, and Judge Paine had agreed that Miller could continue working for Judge Hastings until the end of October so that Miller could complete his work on matters that had been assigned to him. By the end of September, it was also clear that Judge Hastings's travel commitments would keep him away from the court for most of the last three weeks of October. Miller testified that the judge had first inquired about the status of the order for the *Romano* forfeiture on the morning of October 5 and that, when Miller told him it was not complete, the judge said he wanted it that day.

The following day, on October 6, 1981, Miller submitted and Judge Hastings signed an extensive opinion and order (the "*Romano* order") that conformed to his earlier instructions.[9] The order applied *Martino* and *Peacock* and vacated that portion of the original forfeiture order that extended to the $846,000 in cash proceeds. The order also expressed Judge Hastings's disapproval of the precedents he was applying. That decision was a proper and predictable application of the law of the circuit as it then stood, and no one has ever suggested otherwise.

On October 9, 1981, agents of the Federal Bureau of Investigation arrested William Borders. The Justice Department alleged that Borders had agreed with an undercover agent posing as Frank Romano that, in exchange for $150,000 paid to Borders, Judge Hastings would restore a substantial portion of the property originally adjudged forfeit and would thereafter grant a motion eliminating the prison terms and placing the Romanos on probation. Within days, the media were reporting details of the Justice Department's investigation and allegations.

Judge Hastings promptly proclaimed his innocence and disclaimed any knowledge of Borders's corrupt

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[9] 523 F. Supp. 1209 (S.D. Fla. 1981).

scheme. He voluntarily spoke with FBI agents for two hours on the evening of October 9 and responded freely to their questions. As the details of Borders's activities were reported in the press, Judge Hastings asserted that he appeared to have been the victim of what he styled a common "rainmaking" scam by Borders, a scam in which a lawyer extracts a large sum from a criminal defendant by asserting, without basis in fact, that he can influence a particular judge by paying a bribe.

As the leaks to the press continued, Judge Hastings complained to the Justice Department about the apparent violations of professional standards by its employees. He also reported that the "leaks" were enhancing concerns in some quarters that the Justice Department's decision to target him for investigation and its conduct during the investigation and after Borders's arrest may have been influenced by political or other improper factors. The major points of that investigation and the evidence it revealed, as they bear upon the present motions, can now be reconstructed from the records gathered during the post-acquittal investigations.

3. "Operation Apple Eye": The Undercover Investigation

The investigation apparently was authorized based upon information supplied by a man named William Dredge. According to all reports, Dredge was a fence, a burglar, and a drug dealer operating out of Miami. In July 1981, Dredge was the principal defendant in a major drug case pending in federal court in Maryland. On July 20, 1981, he advised Justice Department attorneys in Miami that, in exchange for a deal in his drug case in Baltimore, he could supply information showing that Washington attorney William Borders was solicit-

ing bribes to fix cases pending before Judge Hastings, including the *Romano* case.

The FBI had little trouble finding grounds to launch an investigation into Borders's activities. According to the FBI, they were investigating similar allegations against Borders in Washington, and Dredge confirmed that Borders had claimed that he had the power to fix cases before federal judges other than Judge Hastings. In addition, according to records supplied by the FBI, Dredge's initial information concerning Borders's movements and activities proved accurate.

The FBI has since acknowledged that all available information indicated that Judge Hastings was a highly improbable candidate for such a scheme. Their extensive file showed him to be a man of conviction and integrity who had largely dedicated his life to public service and political affairs without regard for financial success and who had lived and was living comfortably within his means. Nonetheless, the decision was promptly made to initiate investigations directed not only at Borders, but also at the judge.

"Operation Apple Eye", as the FBI named it, formally began on September 10, 1981, the day on which the Justice Department finally gave Dredge a deal in the drug case that satisfied him. According to the FBI, Dredge called Borders that afternoon and told him that the Romanos were ready to deal. Borders flew to Miami late on Friday, September 11. The following morning, at the airport, Dredge introduced Borders to H. Paul Rico, a retired FBI agent posing as Frank Romano.

The meeting was taped, and the basic elements of a deal were worked out—Borders would instruct Judge Hastings to have dinner at the Fontainebleau Hotel on September 16 as the sign of the judge's involvement in the scheme; Rico/Romano would give Borders an unspecified amount as a downpayment on the following

Saturday, September 19; the judge would sign an order within ten days returning a substantial, but unspecified, portion of the forfeited property; Rico/Romano would pay Borders the balance of a $150,000 bribe; and thereafter, the Romanos would dismiss their appeals, and Judge Hastings would grant a motion in mitigation, placing them on probation. Rico/Romano did not suggest that the judge take any action on the 16th that might corroborate his involvement—such as wearing a boutonniere or a specific tie or carrying a specific book.

The first two stages of Operation Apple Eye went as planned. Judge Hastings did dine at the Fontainebleau, with a friend, Essie Thompson, on September 16. Rico/Romano did meet Borders at the airport on September 19 and gave him $25,000 in cash as a downpayment. At that meeting, Borders promised Rico/Romano that the order returning a substantial portion of their property would be out within ten days of that date, by September 29, and the two men agreed to meet at the Miami airport on Saturday, October 3, for the final payoff.

At that point, the plan fell apart. The order was not issued by September 29, and by October 2, the Justice Department had finally become sufficiently concerned to seek a wiretap on Borders's telephones. Several calls between Rico/Romano and Borders were monitored, with Borders giving assurances that he would take care of the problem. The FBI could find no indication, however, of communications between Borders and the judge during the crucial period, and none has since been discovered. Nonetheless, in a telephone call at 4:22 p.m., on October 5, 1981, the FBI intercepted a call in which Borders assured Rico/Romano that the order would go out that afternoon or the following morning and that "your [Rico/Romano's] friend should tell you something." The *Romano* order was, in fact, signed late the following day. There was no evidence, however, of any

94-532 0 - 89 - 2

communication between Borders and Judge Hastings between September 19 and October 5, until forty minutes *after* Borders had assured Rico/Romano that the order would go out.

Judge Hastings did call Borders at 5:12 p.m. on October 5. The government transcriptions of that call merit attention here because the call became the centerpiece of the government's case at trial, and it apparently remains the centerpiece of the House's case seven years later. The version presented to the House reads:

> Mr. BORDERS: Yes, my brother.
> Judge HASTINGS: Yeh, my man.
> Mr. BORDERS: Um hum.
> Judge HASTINGS: I've drafted all those, ah, ah, letters, ah, for Hemp . . .
> Mr. BORDERS: Um hum.
> Judge HASTINGS: . . . and everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
> Mr. BORDERS: Yea.
> Judge HASTINGS: Oh. Okay.
> Mr. BORDERS: Uh huh.
> Judge HASTINGS: Alright, then.
> Mr. BORDERS: See, I had, I talked to him and he, he wrote some things down for me.
> Judge HASTINGS: I understand.
> Mr. BORDERS: And then I was supposed to go back and get some more things.
> Judge HASTINGS: Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
> Mr. BORDERS: Okay.
> Judge HASTINGS: Okay.
> Mr. BORDERS: Right.
> Judge HASTINGS: Bye bye.
> Mr. BORDERS: Bye.

After the *Romano* order was received and several telephone calls later, Rico/Romano offered to come to Washington later in the week to pay the balance of the bribe, and Borders agreed. At that point, the government's "evidence" of Judge Hastings's involvement in Borders's scheme consisted of only three facts—the dinner at the Fontainebleau, the "letters for Hemp" conversation, and the fact that the predicted (and predictable) *Romano* order had finally been issued, albeit a full week after it had been promised. The extraordinary decisions that the Justice Department and FBI made, on the basis of that record, assured that the case would forever remain circumstantial as to Judge Hastings.

Friday, October 9, 1981, had been planned and advertised as a big day for William Borders. He was to be honored for his service as president of the National Bar Association at a dinner-cruise that evening. Lawyers, judges, and other friends from around the country were scheduled to attend. The L'Enfant Plaza Hotel was to be the headquarters. Judge Hastings had agreed months before to act as one of the sponsors and to be one of the speakers at the dinner itself. Early on October 8, the FBI intercepted a call from the judge. The judge told Borders that he had been unable to get a room at the L'Enfant Plaza. Borders said he would take care of that and made arrangements to pick the judge up at the airport the following morning.

With that knowledge in hand, the Justice Department and FBI made plans for the final payoff. Teams of agents were assigned to follow Borders and the judge on the day of October 9. A room was booked for Rico/Romano and wired for video and sound at the Twin Bridges Marriott in Virginia. Rico/Romano flew to D.C. The $125,000 balance was placed in a carrying bag.

The FBI surveillance teams observed the judge's arrival at the airport. They followed him and Borders to

the L'Enfant Plaza and observed them checking in. They followed them to the offices of Borders's law firm. Incredibly, the FBI later reported that its agents did not observe Judge Hastings when he left Borders's offices and walked down the street to a shopping area and, thus, did not even know that he had returned to the L'Enfant Plaza for lunch.

When Borders arrived at his office, he found a message that Rico/Romano had called and left a number. Shortly before noon, Borders returned the call and agreed that he would come to the Twin Bridges Marriott for the payoff. He went. The FBI *arrested him at the scene.* The FBI did not acknowledge, however, until long after the trial, that the government had *planned in advance* to arrest Borders at the scene of the payoff and had never intended to "let the money run" to see if any part of it would be paid to the judge.

The events that followed the arrest later became important. Borders retained John Shorter as his attorney. Shorter knew that Hemphill Pride was a close friend of both Borders and Judge Hastings and had come to Washington for the dinner-cruise. Shorter called Pride at the L'Enfant Plaza and asked him to tell the judge that Borders had been arrested, that the allegations against Borders concerned bribery in the judge's courtroom, and that the FBI wanted to interview him. Pride reported this conversation to the judge in the hotel corridor outside Pride's room.

According to Pride, the judge was shocked. Nonetheless, Pride advised the judge that, in Pride's view, the judge would be better off on his "home turf" in Miami. The judge concurred. He packed, left the hotel, and took a flight from Baltimore-Washington airport back to Florida. Later that evening, he was interviewed by two FBI agents at the Ft. Lauderdale home of his friend and lawyer, Patricia Williams. According to the agents, the

judge denied any knowledge of or involvement in Borders's scheme and responded freely and fully to all the questions that they asked during a two-hour interview.

The Justice Department deployed the resources of the FBI and the subpoena powers of a federal grand jury over the succeeding two-and-one-half months to gather additional evidence to support its views. It was during this period that they gathered the long-distance telephone records for Borders, Ms. Williams, and the judge and other detail that continues to be the subject of study by those who believe the jury got it wrong. They completed that phase of the investigation before the end of the year.

B. THE INDICTMENT AND TRIALS

On December 29, 1981, attorneys from the Public Integrity Section of the Justice Department's Criminal Division filed an indictment in the Southern District of Florida that charged both Judge Hastings and Borders with conspiring to solicit and accept a bribe from the Romanos. Because it is central to this motion, the text of the first two counts of that indictment is reproduced as an addendum to this memorandum.

Judge Hastings moved to dismiss the indictment on a claim that impeachment by the House and conviction and removal by the Senate must *precede* exercise of prosecutorial discretion by the executive against a sitting judge and any exercise of the judicial power by the courts to adjudicate whether he had committed a high crime in office. The judge designated to try the case recognized the significance of the constitutional claims, but denied that motion. He did, however, sever the cases to assure Borders's right to a fair and speedy trial and to afford Judge Hastings a proper opportunity to exercise his right to pursue the constitutional claim on appeal.

1. The Borders Trial and Conviction

Borders was tried in March 1982. There was never any real doubt that he was involved in a corrupt scheme to extract money from someone posing as one of the Romanos. His meetings and conversations with Rico/Romano had been observed and recorded. He had taken the $25,000 downpayment. His October telephone conversations with Rico/Romano had been intercepted and recorded. He had shown up for the payoff.

Borders did not take the stand and, except for challenges in detail by his counsel on cross-examination, made no attempt to rebut this evidence. Instead, Borders relied upon the testimony of prominent former members of the Carter administration and campaigns. They all testified that, based upon their own observations, they had believed that Borders was a man of the highest principle and integrity. They all testified that Borders had established a similar reputation among the highest officials in the Democratic Party and the Carter administration. The government made no effort to challenge these conclusions.

The issue, even then, was whether the government could persuade the jury that there was a conspiracy involving the judge. Had the jury *not* accepted the government's theory on that point, it would have had to acquit Borders, notwithstanding the unrebutted evidence of his corrupt conduct. The prosecution succeeded at that trial. The judge was not present, and the circumstantial evidence the prosecutors marshalled stood largely unrebutted.

The extent to which Borders had managed to conceal his "dark side" from persons in high office impressed even the judge who presided at his trial. At the sentencing, the judge noted that the evidence established that there were two William Borders. One was the William Borders "who ha[d] achieved prominence in his profes-

sion and in the political life of his country" and gained an "unquestioned reputation among his professional associates, political acquaintances, friends, and family prior to the disclosure of the instant case." The other was the "William Borders who was revealed by the evidence in this [the *Borders*] case." The question at the second trial was, in reality, whether Judge Hastings had shared and accepted the universal view of William Borders prior to October 9, 1981, or had known earlier about the darker side that Borders had so successfully concealed from all his other professional associates and political acquaintances.

2. The Hastings Trial and Acquittal

The judge maintained at his trial, as he has throughout, that he was innocent and was, indeed, the principal victim of the corrupt scheme that the "other Borders" developed with Rico/Romano. It was clear that the "other Borders" would, in any event, have had to manipulate an unknowing Judge Hastings in order to persuade Rico/Romano that the judge was a participant, thereby establishing circumstances suggesting guilt. The issue at that trial was whether the events that occurred were the products of coincidence and manipulation, as the judge's testimony indicated, or whether, as the government repeatedly argued, the judge was presenting false testimony to conceal the guilt suggested by those events.

It took the parties more than three weeks of trial time to present so much of the available evidence and arguments as they thought bore upon the underlying issues. For purposes of the present motions, however, only the evidence and arguments submitted to the jury with respect to the allegations that reappear in the first fifteen articles are significant.

a. The Alleged Conspiracy and Its Denial (Articles I–IV). The first four articles simply reallege the conspiracy and claim that Judge Hastings testified falsely when he denied his involvement in an agreement that had the elements specified in the indictment. The jury chose to credit the judge's testimony and reject the government's claim that its evidence showed that the judge was guilty and had testified falsely. These articles simply demand that the Senate permit the House to impeach the jury's verdict so the central allegations may be retried.

b. September 12: Dinner at the Sheraton (Article VI). Judge Hastings and Jessie McCrary were staying at the Sheraton Hotel in Washington on September 12. Borders had known of their plans in advance, but had planned to attend a family reunion in West Palm Beach, Florida, that weekend. At trial, the government proved that Borders changed his plans and took considerable pains to return to Washington that evening, after only a short time at the reunion. As Judge Hastings had informed them, Borders arrived at the Sheraton at about 9:00 p.m. that evening, found the judge and McCrary having drinks in their suite with two acquaintances, and joined the group for dinner.

It was the government's theory that Borders had told the judge that he would rush back from Florida to report on his meeting with Rico/Romano. Judge Hastings denied this and testified that he had been surprised when Borders arrived at their rooms. The prosecutors argued to the jury that the judge's testimony on this point was false. The jury considered and rejected the allegation. Article VI restates the allegation here.

c. September 16: Dinner at the Fontainebleau (Article V). The indictment had also specifically alleged that the judge's dinner at the Fontainebleau was both a part and an overt act in furtherance of the conspiracy. Judge

Hastings testified that it was not. He said that on September 12 or 13, when he was in Washington, Borders had told him he would be in Miami on the following Wednesday and had invited the judge to join him for dinner at the Fontainebleau that evening. There was considerable evidence at both trials establishing that Borders took apparent delight in being mysterious and in showing up when he was not expected and in not showing up when he was. The judge testified he had taken Ms. Thompson to dinner at the Fontainebleau, conscious of the possibility Borders might not be there. After they were seated, however, the judge excused himself, went to another lounge/restaurant in the hotel, and spoke with the *maitre d'*. On this all agreed. The judge testified he had been looking for Borders. Ms. Thompson recalled that upon his return the judge had told her that he had been "looking for some friends from D.C."

The government proved that Borders was, in fact, in Las Vegas attending the Leonard-Hearns fight. Ms. Thompson reported that the judge had not discussed meeting Borders before they arrived for dinner and were seated and had not objected when the other place settings were removed from their table. The prosecutors argued to the jury that the judge's testimony on this point was false. The jury considered and rejected the claim. Article V restates the allegation here.

d. October 5: The Instructions to the Law Clerk (Article VII). The evidence provided by Jeffrey Miller has remained consistent throughout and has never been seriously challenged. Miller testified that the judge had originally asked him to prepare an order after the hearing on July 8, and he explained the reasons for the initial delay. He testified that his next conversation with the judge concerning the case came early in September, when he told the judge about *Peacock* and the judge told

him to draft an order giving the money back. He also testified that he did not discuss the case with the judge again until the morning of October 5, when the judge inquired and then said he wanted the order that day. Mr. Miller testified that such a preemptory instruction from Judge Hastings was unusual. The government claimed that the timing and nature of the instruction were evidence that the judge was responding to Borders, notwithstanding the absence of any evidence of communication between the two men.

Judge Hastings testified that he had given the preemptory instruction to the law clerk because the order was long overdue, because the clerk's replacement had already started, and because his travel schedule would keep him out of Miami for most of the remainder of October, at which point Mr. Miller would be gone. There was no dispute over the underlying facts; the argument concerned whether those facts or a corrupt motive had provided the impetus for the judge's instruction. The prosecutors argued that the judge's testimony on this point was false. The jury considered and rejected that claim. Article VII restates the allegation here.

e. October 5: The Telephone Call to Borders and the Letters for Hemp (Articles VIII and IX). The prosecutors introduced the intercepted October call from Judge Hastings to Borders concerning "letters for Hemp" and argued that it was a coded conversation that in fact referred to the *Romano* order. According to Judge Hastings, the subject of the conversation was "letters for Hemp." It was undisputed that "Hemp" was a nickname for Hemphill Pride, and one that the judge had long used.

According to the judge, Pride had made it clear that he desperately wanted to regain admission to practice one day, even before he went to prison. The judge reported that, beginning at an NBA meeting in July 1981,

Borders had told him that Pride was in bad financial shape and would need their assistance to raise funds and build a record that would support his readmission. The judge reported that he expressed reservations over the propriety of his actively soliciting assistance, given his position as a federal judge. The judge testified that Borders argued that concern for a friend in trouble should override the ethical concerns and thereafter pestered the judge to write letters soliciting assistance for Hemp.

At trial, the judge testified that he had in fact prepared handwritten drafts of such letters while he was on the bench on October 5, 1981. These he claimed were the subject of his and Borders's discussion on the telephone that evening. He produced the handwritten drafts. He explained that they had not been typed because he had decided that, as a judge, he could not appropriately distribute such letters, a point he intended to discuss with Borders and Pride when they were together in Washington for the dinner-cruise the following weekend.

Pride acknowledged that he and the judge had spoken regularly by telephone over the summer and had discussed his prospects for regaining his license. He testified that he was not, however, aware of any efforts on his behalf by Borders and that he would not have approved of such efforts. The prosecutors argued to the jury that the judge's explanation of the telephone call was false and the letters fabricated. Those were allegations the jury considered and rejected. Articles VIII and IX restate those allegations here.

f. October 9: The Return to Florida (Articles XIV–XV). Judge Hastings testified that he was shocked by Pride's report of Borders's arrest and the suggestion that the allegations concerned him. The judge testified that he returned to his room alone and placed telephone calls to

his invalid mother and Patricia Williams. According to the judge, Pride later rejoined him and stayed while the judge packed. The judge testified that he took a taxi to Baltimore-Washington International Airport because he believed there was a convenient flight to Florida from the airport and he was not aware of a more convenient flight from nearby National Airport. The government confronted him fully on both points.

The corroborating evidence from both sides was in conflict. Pride testified that he accompanied the judge to his room and did not see the judge make any telephone calls. Shirley Pride, Pride's then wife, testified, however, that after meeting with the judge in the hall, Pride had returned to their room for about fifteen minutes before leaving again to go to the judge's room. The government produced the hotel's "hobic system" computed-generated records that were supposed to record all long-distance telephone calls from the hotel. It showed no calls from the judge's room, not even a third call the judge said he had made to one of his law clerks earlier in the day. The record contained, however, no records of *any* long-distance calls from *any* of the hotel's 472 rooms during the crucial period, and both the judge's law clerk as well as his mother testified that each had received a call from the judge. The prosecution also showed the relative distance of the two airports and established that there had been a flight to Florida leaving from National Airport late that afternoon.

The evidence was fully developed and tested on examination and cross-examination. The prosecutors argued that the judge's testimony on these points was false and that that was further evidence of his guilt. Those were allegations the jury considered and rejected. Articles XIV and XV restate those allegations here.

g. Misidentification of Telephone Records (Articles X–XIII). At trial, Pride's and the judge's testimony were consistent on one point. Both men testified that they had spoken to each other regularly, by telephone, over the summer of 1981. That is a fact that was not then (and is not now) in dispute.

The government had gathered relevant long-distance billing records during the grand jury investigation in 1981. These were produced at trial. The records for the telephones of the judge and Patricia Williams, the judge's friend and co-counsel at trial, were marked and introduced in evidence. During his two days on the stand, the judge identified charges for calls to four telephone numbers in Columbia, South Carolina, as being calls he made to Hemphill Pride. It was apparent to all that this evidence was detail offered to corroborate a fact not in dispute. The prosecutor agreed that calls to Pride had been made, and they did not challenge the judge's identification of telephone numbers on cross-examination or in rebuttal.

The post-acquittal record establishes that the judge was wrong in identifying these as telephone numbers where Pride could be reached. None of the numbers was one of Pride's numbers, and each was for a phone at a place where Pride was not likely to have been present. The judge's testimony was wrong, and he or Ms. Williams should have discovered the error. They did not. The question posed is whether these were trivial errors made by the judge and his then relatively inexperienced trial counsel during more than two grueling days on the stand, or whether the judge perjured himself to corroborate a fact not in dispute. Articles X–XIII ask the Senate to conduct a trial to resolve that issue.

The Justice Department has never suggested that *it* did not have a full and fair opportunity to develop the case *against* Judge Hastings. The Department's lawyers

worked with the FBI, from the outset, in the design and implementation of Operation Apple Eye. When that operation ended with Borders's arrest on October 9, the prosecution and the FBI used the rest of the year and the powers of the grand jury to perfect their evidence. As a result of the severance, they were able to test-market one part of their case and have a full year to complete preparations for Judge Hastings's trial. It was the judge who complained that the proceedings were unfair, and the post-acquittal record provided ample support for that claim.

C. THE POST-ACQUITTAL INVESTIGATIONS

Most observers confidently predicted that the jury's verdict would end the matter—some on principle; others thought the government's decision to arrest Borders at the scene of the payoff undermined its credibility as well as its case so severely as to preclude further action; still others took the view that political considerations alone would preclude the House from undertaking an inquiry to look behind a jury's verdict of acquittal. The record now reflects, however, that senior members of the Eleventh Circuit judiciary had decided to seek Judge Hastings's removal almost immediately after he had been acquitted and resumed his judicial duties.

1. The Judicial Investigation

At a meeting of the Judicial Council of the Eleventh Circuit in March 1983, then-Chief Judge John Godbold expressed dissatisfaction that he had not yet received a complaint that would permit him to initiate proceedings against Judge Hastings under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (the "1980 Act").[10] Two of the then district judge mem-

[10] Pub. L. No. 96-458, 94 Stat. 2035 (1980), *codified as amended at* 28 U.S.C. §§ 331, 332, 372(c), 604(h) (1982 & Supp. 1984).

bers of the Council promptly obliged. On March 17, they filed a complaint that alleged that Judge Hastings was guilty of the alleged conspiracy, notwithstanding his acquittal. They appended, as the principal source upon which they relied, a copy of the 1982 opinion, authored by Circuit Judge Frank Johnson, in which the court of appeals had affirmed Borders's conviction, an opinion that had been issued before Judge Hastings had even been tried.[11] In that opinion, Judge Johnson detailed the evidence adduced at Borders's trial which the court of appeals thought sufficient to support a finding that Judge Hastings had been involved in Borders's corrupt scheme.

The intended outcome of the judicial investigation was signalled less than a month later. Chief Judge Godbold appointed himself and Judge Johnson, the author of the *Borders* opinion, along with three other judges, to constitute the Investigating Committee that would investigate the complaint. The Investigating Committee ignored the some 50,000 lawyers who had offices in the Eleventh Circuit. Instead, it retained John Doar of New York, the lawyer who had served as special counsel to the majority for the Watergate impeachment inquiry conducted by the House Judiciary Committee. Lest the point be lost, on April 15, 1983, Chief Judge Godbold issued a news release reporting these events, notwithstanding the much vaunted confidentiality provisions of the 1980 Act.[12] The point was not lost, at least in the judge's community.

For the next three-and-a-half years, Mr. Doar conducted an extensive investigation in an effort to unearth additional material evidence. As he later conceded, he failed. The best he could do was develop evidence which

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[11] *United States* v. *Borders*, 693 F.2d 1318 (11th Cir. 1982).

[12] *Codified at* 28 U.S.C. § 372(c)(14).

had been available to the prosecutors in 1983, but which had not been presented at trial.[13]

That failure was not, however, attributable to any lack of effort on Mr. Doar's part. One hundred and ten witnesses testified before the Investigating Committee. These included all the witnesses that the prosecutors had called at either Judge Hastings's or Borders's trials. They included only eight of the more than forty witnesses Judge Hastings had called in his defense. The Investigating Committee heard all but one of the FBI agents who have been identified as having participated in Operation Apple Eye and all the other known witnesses whom the prosecutors had decided not to call at either trial.

The Investigating Committee did compel testimony from one witness, William Dredge, that confirmed that the prosecutors had improperly withheld material information from Judge Hastings in order to prevent him from presenting evidence in support of his principal defense. In 1981, the Justice Department had induced Dredge to aid them in implementing Operation Apple Eye by promising, as part of the written plea agreement, that he would never be called to testify concerning his involvement in any proceeding. Judge Hastings

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[13] Judge Hastings did not appear and was not represented at the Investigating Committee's hearings. He had filed a suit challenging the constitutionality of the 1980 Act and the proceedings against him more than a year before the Investigating Committee scheduled its first hearing. The Investigating Committee scheduled its hearings to begin after the challenge to the 1980 Act and its authority had been argued and submitted to the United States Court of Appeals for the District of Columbia Circuit. In order to preserve his objections, Judge Hastings filed a Special and Limited Appearance with the Investigating Committee, objecting to its jurisdiction and declining to appear until his constitutional claims had been finally adjudicated. The Investigating Committee conducted its hearings in his absence.

has diligently sought to compel Dredge to appear and testify at his 1983 trial and ultimately filed a motion asking the court to order the government to produce him as a material witness. The prosecutors vigorously and successfully opposed that motion, representing to the court that Dredge had no material information.

At trial, Judge Hastings had also sought to introduce evidence to demonstrate that all judges were vulnerable to unfounded claims made by a few unscrupulous lawyers that they had the power to fix cases before particular judges. The government objected, and the trial judge ruled that Judge Hastings could not present such evidence to the jury, unless he first produced evidence showing that Borders had claimed the power to fix cases before judges other than Judge Hastings.

Upon the Investigating Committee's request, the FBI did produce Dredge, and the committee compelled him to testify, notwithstanding his plea agreement. Dredge testified there that Borders had claimed, in Dredge's presence, that he had power to fix cases before several judges, including federal judges other than Judge Hastings. Thus, the prosecutor's representation at Judge Hastings's 1983 trial was not only false; it also enabled the prosecutors to bar the judge from presenting evidence in support of a major defense.[14]

Evidence such as that was not disclosed by the Investigating Committee in the 381-page report it filed with the Council in early August 1986. Instead, the Investigating Committee remarshalled circumstantial evidence that supported the conclusion that the judge was a par-

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[14] The impropriety of the prosecutors' objection and misrepresentation was confirmed when the FBI's case agent later acknowledged that, in addition to Dredge's report, the FBI also had independent information concerning Borders's claims with respect to other judges.

ticipant in Borders's corrupt 1981 scheme and that the judge's testimony contradicting that conclusion had been false. The Council refused to provide Judge Hastings or his counsel with a copy of that report or the record that the Investigating Committee had compiled. Less than a month later, on September 2, 1986, the Council adopted the Investigating Committee's findings and certified the matter to the Judicial Conference.

The Conference also declined to give a copy of the Investigating Committee's report or record to Judge Hastings; it did, however, grant his counsel access to the material for a 120-day period. As a result, on January 17, 1987, Judge Hastings filed a petition asking both houses of Congress to intervene and bring the proceedings to an end.[15] That petition was accompanied by a 189-page preliminary report prepared by his counsel analyzing the record compiled by the Investigating Committee and articulating reasons why the matter should be ended then.[16] A copy of that report was also submitted to the Conference. In Congress, the petition and report were promptly referred to the Committees on the Judiciary in both Houses.[17] Thereafter, at its regular semi-annual meeting on March 17, 1987, the Conference concurred in the Council's determination and certified the report and record to the House for consideration of impeachment.

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[15] "The Petition of the Honorable Alcee L. Hastings, a United States District Judge, for Redress of Grievances and Other Legislative Relief" (Jan. 16, 1987); *see* note 17 below.

[16] Anderson, *A Provisional and Preliminary Report on the Proceedings Against United States District Judge Alcee L. Hastings: 1981-1986* (Jan. 16, 1987) (reissued Nov. 1987) (the *"Provisional Report"*); *see* note 17 below.

[17] 100 Cong. Rec. H. 271 (Jan. 20, 1987); *id.* at S. 1503 (Jan. 21, 1987).

2. The House Inquiry

The Conference certification and an implementing resolution were also referred to the House Committee on the Judiciary, promptly after the Conference issued its certificate in March 1987. Shortly after the Committee had retained special counsel and referred the inquiry to its Criminal Justice Subcommittee, Judge Hastings expressed his desire to have his counsel participate in the investigative phase of the inquiry in order to assure that the inquiry was balanced and that it explored areas that the three-and-a-half-year judicial investigation had failed to address. Those letters identified House precedents for the conduct of impeachment inquiries into accusations against a judge supporting these requests.

The Chairmen of the House Committee and Subcommittee rejected those requests, assuring the judge, however, that his rights would "be fully protected." They advised that the Subcommittee had not "adopted rules governing formal proceedings for the conduct of this inquiry" and concluded that the judge's concerns over "matters relating to procedures" could "be more appropriately considered when such rules are formulated."

As it developed, the Subcommittee never adopted rules for the inquiry. The Subcommittee scheduled its hearings to begin on May 18, 1988. As of May 2, its special counsel advised counsel for the judge that the Subcommittee had not adopted or decided upon procedures for the hearings. Thereafter, special counsel sporadically advised counsel for the judge by telephone of the procedures the Subcommittee would apply, the final call coming at 5:30 p.m. on May 17, 1988, the evening before the hearings began.

The procedures used at those hearings were unprecedented. The rules of evidence were not applied, and counsel for Judge Hastings were prohibited from

making objections. As a result, the testimony presented by the principal witness before the Subcommittee represented the most dramatic violation of hearsay principles since the impeachment trial of Sir Walter Raleigh in 1603. John Doar, chief counsel to the Investigating Committee, testified for two-and-a-half days, summarizing the testimony that that committee had heard and had seen which supported the conclusions contained in its report. Judge Hastings submitted a list of seventy persons and asked that they be called as witnesses so that avenues identified, but not pursued, by the Investigating Committee or in the pre-hearing phase of the inquiry might finally be explored and that other matters in his defense might be developed. The Subcommittee called only two, and those were persons whose information was relevant only to the "improper disclosure" accusations made in Article XVI.

III. THE CONSTITUTIONAL PRINCIPLES AND THEIR APPLICATION

It is against this backdrop that the Senate must consider whether the accusations made in the first fifteen articles should be retried now before the Senate. We submit that any fair view of the Constitution, its history, and the contemporary need to restore the separation of powers necessary for the proper functioning of all three branches dictates that they should not. We identify and develop the constitutional principles and policies that compel this conclusion below.

A. FUNDAMENTAL FAIRNESS TO THE ACCUSED REQUIRES THAT THE ARTICLES BE DISMISSED

1. The Constitution, its History, the Framers' Intent, and Established Jurisprudence are Clear: Double Jeopardy Applies and Bars a Second Trial of An Acquitted Judge on Accusations That a Jury Rejected.

The Constitution explicitly addresses the application of the prohibitions against double jeopardy in cases of

impeachment. It creates an express exception for a *"party convicted"* of an impeachable offense. It creates no exception for a *party acquitted.* Moreover, the House initially proposed that a general exception for "Cases of Impeachment" be made in the double jeopardy clause to be included in the Bill of Rights. The Senate rejected that proposal, and the House receded. The exception was deleted, and the double jeopardy clause in the Bill of Rights, as adopted, contains no provision that would justify engrafting an exception for a *party acquitted.*

Unlike former Judge Claiborne, Judge Hastings is a *party acquitted.* The reports that the judiciary and the House have issued to justify the impeachment of Judge Hastings suggest that this distinction should make no difference and do not address the relevant constitutional provisions or the history that led to their adoption. For that reason they are developed in some detail here.

a. Relevant Constitutional Provisions and History. The Constitution expressly classifies cases of impeachment as criminal in nature. The standard for impeachment is the English criminal standard: "The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and *Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."* U.S. Const., Art. II, § 4.[18] The need to create exceptions in cases of impeachment to rights accorded the accused in ordinary criminal cases was recognized and made explicit: "The Trial of all *Crimes, except in Cases of Impeachment,* shall be by jury." Art. III, § 2, cl. 3. "The President . . . shall have the Power to grant *Reprieves and Pardons* for all *Offenses* against the United States, *except in Cases of Impeachment."* Art. II, § 2, cl. 1.

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[18] Italics have been supplied for emphasis, unless otherwise noted.

The general applicability of the double jeopardy prohibition was also recognized, and one and only one exception was made. That was the exception for parties convicted:

> Judgments in Cases of Impeachment shall not extend further than removal from Office, and disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States: but *the Party convicted* shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

Art. I, § 3, cl. 7. The Constitution did not and does not include any exception to the general principle for *a party acquitted.* The intent evidenced by the language of the Constitution is confirmed by the history that led to the adoption of these provisions.

Three historical facts are not in dispute. Cases of impeachment originated as and remained criminal cases in England. The framers were aware of the nature and essential characteristics of cases of impeachment in England and in the thirteen states when they drafted our Constitution. They intended the nature and characteristics of cases of impeachment be the same under our Constitution, with specific changes adopted to limit the jurisdiction and powers of the House and Senate in order to eliminate abuses that had occurred in English impeachment cases.[19]

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[19] *See, e.g.,* Hamilton, *The Federalist No. 65* at 440–41 (Hamilton) (Cooke ed. 1961) (model borrowed from Great Britain and State constitutions that followed the example), *id. No. 84* at 576 (identifying limit on Senate's power to impose punishment as a protection for the accused) [all further citations to pages in *The Federalist* are to the Cooke ed.] *See also The Constitution of the United States: Analysis and Interpretation,* S. Doc. 82, 92d Cong. 2d Sess. 572–78 (1973) (summary of history and interpretation) [hereinafter cited as *"Con-*

Continued

Three aspects of that history bear on the issues now before the Senate. First, the framers considered and rejected proposals that the power of impeachment extend to non-criminal charges, such as those alleging "malpractice or neglect of duty." They also rejected the suggestion that "maladministrations" be added to the standard for impeachment. Instead, the standard adopted was the criminal standard, exactly as it had been established in England: "Treason, Bribery, and other high Crimes and Misdemeanors." [20]

Second, the framers also understood that the English impeachment standard embraced political offenses against the state, offenses that were not recognized as crimes at common law. They understood that the House and Senate might also confront abuses by officeholders that should be recognized as offenses against the state in cases of impeachment, even though the challenged conduct might not also constitute statutory crimes which could be prosecuted in the courts.[21]

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stitution: Analysis'']. We have limited our citations and discussions on points that we believe are not open to genuine debate. If the managers' response suggests that we have overlooked a significant disagreement, we shall amplify the point and discuss the relevant authorities in reply.

[20] *See, e.g., Constitution: Analysis* at 575–77. The central issue in prior impeachments and among historians and constitutional scholars has concerned the extent to which that standard embraces political offenses against the United States that are not also legal offenses under statutory standards. Because the articles that are challenged by this motion allege (or could be amended to allege) offenses that would be crimes under either standard, this motion does not raise that issue. *See* note 21 below.

[21] The practice of the Senate has placed this issue beyond serious dispute, if ever it was. *See, e.g.* Impeachment Inquiry Staff, "Constitutional Grounds for Presidential Impeachment," in *High Crimes and Misdemeanors: Selected Materials on Impeachment*, 1–26 (1973).

Third, although the framers recognized the need to preserve the flexibility established by English practice, they also sought to eliminate two abuses that had marked English practice in impeachment cases. Persons other than officeholders could be and had been impeached by the House of Commons and tried and convicted by the House of Lords. More important, the House of Lords had exercised the power to impose the full range of penal sanctions, including the death penalty, upon persons convicted of "offenses against the state" in impeachment trials for conduct that would not have constituted crimes under established common law principles.[22]

The framers sought to minimize the potential for abuse in three ways. They limited the class of persons subject to impeachment to officers of the United States—"The President, Vice President, and all Civil Officers . . . ." They also sought to protect the accused from political passion and bias by raising the standard that was required for conviction: From the simple majority required in the House of Lords to a requirement that ". . . no Person shall be *convicted* without the Concurrence of *two thirds* of the Members present." U.S. Const., art. I, § 3, cl. 6. More important, they limited the punishment the Senate might impose to ". . . removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States . . . ."

The apparent meaning established by the language and history of these provisions is confirmed by the explanations Hamilton provided in *The Federalist.* Hamil-

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[22] *See, e.g.,* R. Berger, *Impeachment: The Constitutional Problems,* 54-55 (Harvard 1973); P.C. Hoffer and N.E.H. Hull, *Impeachment in America, 1635-1895,* 3-8 (Yale 1984) (summaries of English practice on point).

ton confirmed the framers' understanding that cases of impeachment were cases in which the holder of an office of honor and trust was accused of a serious offense and made liable to severe punishment. Hamilton also made it clear that the framers drafted specific provisions to provide adequate protection for the innocent accused; to limit the severity of the punishment that could be imposed upon those convicted of an offense against the state which did not also constitute an offense under the criminal statutes; and, finally, to assure that those convicted of offenses that were crimes under both constitutional and statutory standards could be held accountable in full measure. Hamilton's views have not been recalled thus far by those who have urged that the present case is proper; they should be recalled for those who must decide the present motion.

Hamilton devoted *The Federalist No. 65* to explaining and defending the framers' decision that "the sole power to try all Impeachments" should be assigned to the Senate. He was confronting arguments that placing the judicial power to sit as a court of impeachment in the legislative branch was inconsistent with the separation of powers model and that the power should have been allocated to the Supreme Court. He argued in the first instance that the political nature of the offense, the passions that would be aroused, and the potential consequences to the accused were such that a body more numerous than the Supreme Court and whose members had the security to do impartial justice in the face of public clamor and political pressure was necessary:

> Where else, than in the Senate could have been found a tribunal sufficiently dignified, or sufficiently independent? What other body would be likely to feel *confidence enough in its own situation,* to preserve unawed and uninfluenced the

> necessary impartiality between an *individual* accused, and the *representatives of the people, his accusers?*
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> The necessity of a numerous court for the trial of impeachments is equally dictated by the nature of the proceeding. This can never be tied down by such strict rules, either in the delineation of the *offence* by the *prosecutors,* or in the construction of it by the Judges, as in common cases serve to limit the discretion of courts in favor of personal security. There will be no jury to stand between the Judges, who are to pronounce the *sentence* of the law and the party who is to receive or suffer it. *The awful discretion, which a court of impeachments must necessarily have, to doom to honor or to infamy the most confidential and the most distinguished characters of the community, forbids the commitment of the trust to a small number of persons.*[23]

Hamilton's second argument drew directly upon the express exception to the protection against double jeopardy that the framers had created for a *"party convicted"*. Because a party *convicted* and punished in one forum might be subject to a second trial and further punishment, the proceedings had to be conducted in separate branches.

> These considerations seem alone sufficient to authorize a conclusion, that the Supreme Court would have been an improper substitute for the Senate, as a court of impeachments. There remains a further consideration which will not a little strengthen this conclusion. It is this. The *punishment,* which may be the consequence of *conviction* upon impeachment, is not to terminate

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[23] *The Federalist No. 65* at 441–42; emphasis in original in first paragraph quoted, supplied in the second.

> the *chastisement* of the offender. After having been *sentenced* to a perpetual ostracism from the esteem and confidence, and honors and emoluments of his country; he will still be liable to *prosecution* and *punishment* in the ordinary course of law. Would it be proper that the persons, who had disposed of his fame and his most valuable rights as a citizen in one trial, should in another trial, for the same offence, be also the disposers of his life and his fortune? . . . Those, who know any thing of human nature, . . . will be at no loss to perceive, that by making the same persons Judges in both cases, those who might happen to be the objects of *prosecution* would in a great measure be deprived of the double security, intended them by a double trial. The loss of life and estate would often be virtually included in a *sentence,* which, in its terms, imported nothing more than dismission from a present, and disqualification for a future office. . . .[24]

Hamilton again refers to the limitations on the Senate's power in cases of impeachment in his defense of the proposed Constitution against those who decried the absence of a bill of rights.[25] In context, his reference makes it clear that the limitation on the extent of the punishment the Senate might impose was necessary to prevent those charged with non-statutory political offenses from suffering excessive punishments based upon *ex post facto* definitions creating offenses against the state. That reference provides further evidence that it was this limitation that provided the sole justification for a limited exception to the bar of double jeopardy—an exception for a *party convicted* by the Senate for an offense that was also punishable as a crime under established criminal statutes. The limitation on the Senate's

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[24] *Id.* at 442.

[25] *The Federalist No. 84* at 575–77.

power to impose penal sanctions did not, however, create any need or justification for a comparable exception for a *party acquitted,* and none was made in the Constitution as the framers proposed it and as the people adopted it.

This understanding was rather dramatically confirmed in the First Congress. Madison confirmed the framers' understanding that, absent an express exception, the protections against double jeopardy would apply in cases of impeachment as in other criminal cases. He thought a general exception was warranted. Under the language he proposed for a bill of rights, "Cases of Impeachment" would have been excepted entirely from the established protections against double jeopardy. As he framed it, the clause would have read: "No person shall be subject, *except in Cases of Impeachment,* to more than one punishment or one trial for the same offense." [26] The House adopted Madison's proposed language.[27]

The language adopted by the Senate, however, excluded the general exception,[28] and in conference the Senate stood firm. The House receded and the exception was deleted.[29] The language proposed by the Senate was the language that became part of the Bill of Rights adopted by the people: ". . . [N]or shall any person be

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[26] 1 Annals of Congress 434 (June 8, 1789), *reprinted in* B. Schwartz, *The Bill of Rights: A Documentary History ("Documentary History")* at 1027.

[27] House of Representatives Journal, September 1789, *reprinted in Documentary History* at 1122–75.

[28] Senate Journal, August-September 1789, *reprinted in Documentary History* at 1147–54.

[29] House Debates, September 24, 1789, *reprinted in Documentary History* at 1162.

subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const., amend. V.[30]

The historical evidence, the express language chosen, the contemporary arguments advanced by the framers, and the actions taken in the first Congress are consistent, and, collectively, they establish three propositions. Cases of impeachment were understood and intended to be criminal in nature. Although the precise extent of the rights of an accused in cases of impeachment may be ambiguous in some respects, the framers understood that protection against double jeopardy would apply, absent express exceptions. They twice considered whether and what exceptions should be made, and they agreed upon one and only one exception—an exception for parties *convicted*. Those propositions alone make it clear that the bar of double jeopardy must be recognized where the House seeks to prosecute a party *acquitted* on accusations that a jury has previously rejected.[31]

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[30] The Supreme Court long ago established that the protection extends to all offenses that place an accused "in peril of legal penalties upon the same accusation," under the Constitution as it had at common law, not just to those that expose the accused to loss of life or limb. *Ex Parte Lange,* 85 U.S. (18 Wall.) 163, 172-73 (1873).

[31] The House expressed the view that cases of impeachment should not be viewed as criminal in nature when it adopted the challenged articles. *House Comm. Rep.* at 61-62. The historical record, however, demonstrates that the framers rejected that view in the express language chosen and the declared intent provided when they drafted the Constitution that the people adopted. We submit the position taken by the House cannot be reconciled with the text or intent of the Constitution. If we are in error, it is incumbent upon the managers to assume the burden of demonstrating how the Constitution, in text and history, can be reconciled with the House's demand that these accusations be retried. Absent such demonstration, we ask that the Senators honor the language and intent of the Constitution.

b. Due Process and Double Jeopardy. The Supreme Court has recognized that protection against double jeopardy is one of those guarantees that are so "fundamental to the American scheme of justice" that they are among the core protections embodied in the due process clauses. U.S. Const., amend. V and XIV.[32] The Court has also regularly been called upon to determine whether particular proceedings are criminal in nature in order to determine whether the protection against double jeopardy, or other protections that must be accorded the accused in criminal cases, must be available in those proceedings. The tests established by this jurisprudence, even in the narrowest view, confirm that, for purposes of double jeopardy, cases of impeachment must be viewed as criminal in nature.[33]

The first and ordinarily dispositive test is whether those "establishing the penalizing mechanism . . . indicated either expressly or impliedly a preference for one label [criminal or civil] or the other." [34] The Constitu-

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[32] *Benton v. Maryland,* 395 U.S. 784, 794-95 (1969); *cf. Constitution: Analysis* at 1094.

[33] After the House Subcommittee's hearings had begun, we were asked to identify one or more constitutional scholars whose views bore upon the application of double jeopardy in cases of impeachment. We promptly located a local scholar, Professor Thomas G. Krattenmaker of the Georgetown University Law Center, who was available and willing to appear. The Subcommittee later decided it did not wish to hear such scholarly views. Nonetheless, we proffered a summary of the views Professor Krattenmaker was prepared to express for the record. (After that proffer, the Subcommittee staff located a professor in Iowa who agreed to express a differing view. Neither was called to testify so that the differences might be examined and explored.) For the convenience of the Senate, we include a copy of the proffer we submitted to the House Subcommittee in the addendum to this memorandum.

[34] *United States v. Ward,* 448 U.S. 242, 248 (1984) (quoted language and summarizing applicable principles).

tion expressly and impliedly labels cases of impeachment as criminal cases, and the framers' intent could hardly be clearer. Whatever the scope of the conduct embraced, the Constitution requires the accusations be labeled "Treason, Bribery, or other high Crimes and Misdemeanors." The framers thought it necessary to carve out express exceptions to the principles applicable to the general classes of offenses labeled as crimes for that sub-class of offenses that were to be handled as cases of impeachment: "The Trial of all Crimes, except in Cases of Impeachment, shall be by jury;" "The President . . . shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment." The remaining language used confirms, by implication and expression, the intent of the document. If two-thirds of the Senators present concur, a "Person shall be *convicted* . . .", and a "Party *convicted* shall nevertheless be liable and subject to *Indictment,* Trial, Judgment and *Punishment*, according to Law."

The labels chosen and the framers' intent are clear. Cases of impeachment are criminal in nature, and no implication to the contrary can fairly be inferred from the words chosen, the history considered, or the intent expressed by the framers. Double jeopardy applies in cases of impeachment.[35] It is equally clear that double

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[35] The House, to date, has relied upon a revisionist view in which the language and intent of the Constitution may be largely ignored in favor of a functional analysis. Under that view, the House urges that cases of impeachment are purely remedial, apparently the constitutional equivalent of administrative proceedings before the Merit Systems Protection Board. In point of fact, the tests employed in a functional analysis under the due process clause simply confirm that cases of impeachment are punitive, as well as remedial, and would have to be viewed as criminal in nature in any event. *See* notes 36–38 and accompanying text.

jeopardy *should* apply in cases of impeachment. This is confirmed by an analysis of the function of impeachment and the policies underlying the protection against a second trial.

All proceedings in which the government may properly impose a sanction upon the individual must have a remedial purpose. Imprisonment and the death penalty serve the remedial purpose of removing the convicted offender from society and thereby protecting it from further acts of criminal misconduct. Criminal fines restore some or all of the costs society has expended to enforce the law and may serve other remedial purposes. Functional analysis does not depend upon whether the sanction authorized has a remedial purpose; rather it depends upon the nature and severity of the punishment that may be imposed upon the accused.

The sanction authorized in cases of impeachment is not merely remedial, it is also penal and is so classified in the Constitution. The Senate does not remove; it convicts (or acquits). Removal is merely established as the minimum consequence that follows from a conviction. But the Senate has power to punish further: It may sentence the convicted accused to a permanent "disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." And those are the only punishments that the Constitution denies the President the power to relieve through the powers of reprieve and pardon.

In Hamilton's words, the Constitution confers upon the Senate sitting in cases of impeachment, "The awful discretion . . . to doom to honor or infamy the most confidential and the most distinguished characters of the community. . . ." [36] That sanction is penal, and surely those who have held positions of high honor

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[36] *The Federalist No. 65* at 441–42.

must recognize that it is and was intended as a punishment most severe.

Under established jurisprudence, the nature and severity of the sanction that may be imposed in cases of impeachment confirm that they are criminal in nature. The sanction of permanent disqualification "involves an affirmative disability or restraint" and "has historically been regarded as a punishment." [37] "[I]t comes into play only on a finding of *scienter,*" and its operation promotes "the traditional aims of punishment—retribution and deterrence." [38] Whatever its full scope, the sanction applies to "behavior . . . [that] is already a

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[37] *Kennedy v. Mendoza-Martinez,* 372 U.S. 144, 168 (1963). The issue the Supreme Court confronted in *Kennedy* and its disposition bear directly upon this case. Congress had prescribed that an American who left or stayed outside the United States during a time of war or national emergency should be divested of American citizenship. The petitioners had both admittedly violated the statute—one during World War II, the other during the Korean Emergency. They had been divested of their citizenship. They challenged the rulings on ground that the statute prescribed a criminal penalty without requiring that the sentence be conditioned upon a conviction in a criminal trial. The Court agreed.

The Supreme Court was required to balance the legitimate power of Congress to exercise its powers to provide for the national defense and regulate foreign affairs—both admittedly important and legitimate ends, against the loss of a most precious right—American citizenship. The Court ruled that the *end* could not justify the *means* chosen because the sanction of loss of citizenship was clearly penal.

The Constitution authorizes the Senate to impose a similarly severe sanction against an accused officer—to strip him or her of one of the most precious rights of a citizen, the right to seek or "hold and enjoy any Office of honor, Trust or Profit under the United States." The principles applied in *Kennedy* would compel the same conclusion here: the proceeding here is criminal in nature.

[38] *Id.*

crime" and, with respect to disqualification, the sanction has no alternative purpose other than punishment that "may rationally be . . . assignable for it." [39] The functional analysis simply confirms that the framers properly classified cases of impeachment as criminal in nature and that the House's attempt to reclassify them is improper.

The issue before the Senate is not merely a question of classification and consequence. The core policies underlying the protections afforded by the bar of double jeopardy are clearly applicable here:

> The constitutional prohibition against "double jeopardy" was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. . . . The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
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> In accordance with this philosophy it has long been settled under the Fifth Amendment that a verdict of acquittal is final, ending a defendant's jeopardy, and even when "not followed by any judgment, is a bar to a subsequent prosecution for the same offence." . . . Thus it is one of the elemental principles of our criminal law that the Government cannot secure a new trial by means

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[39] *Id.* at 168–69. The Supreme Court reaffirmed the validity of these recommendations in *United States v. Ward*, 448 U.S. at 249.

> of an appeal, even though an acquittal may appear to be erroneous. . . .[40]

All three branches of the federal government have used the resources and powers of the State to lay a foundation for a second attempt to convict Judge Hastings for the offenses now alleged by the House. For seven years, they have subjected him to embarrassment, expense, and ordeal and have compelled him to live in a continuing state of anxiety and insecurity. They have sought to enhance the possibility he might be convicted by utilizing the information he had provided through his defense at trial to develop further evidence against him. They *have* enhanced the possibility of an erroneous conviction by accumulating evidence that supported their accusations and seeking to present it seven years after the fact, long after the record and recollections of those who might have aided the accused have been lost or dimmed beyond repair.

The ordeal and the anxiety should have ended in 1983. They did not. At the urging of the judiciary, the House seeks to evade the prohibition against appeals by collaterally attacking the jury's verdict in the Senate. That cannot be allowed.

The Constitution by its language, intent, and consequences establishes that cases of impeachment are criminal in nature. Established jurisprudence and underlying policy combine with the express language and intent to make it clear that the bar of double jeopardy does and should preclude the House from imposing the burden of a second trial upon an accused who has already been acquitted by a jury of the offenses it alleges.

The first fifteen articles, in essence, make only two accusations—that Judge Hastings participated in the

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[40] *Green v. United States*, 355 U.S. 184, 187-88 (1957) (citations omitted).

1981 conspiracy, as alleged in the original indictment, and that he presented false testimony and fabricated evidence at his 1983 trial, as argued by the prosecutors to the jury in 1983. The first accuses the judge of the same offense as that on which he was tried and acquitted in 1983. The second makes an accusation that the prosecutors made and the jury necessarily decided when it found the judge not guilty. A trial on either would require that the managers present and the Senate consider the same evidence as the prosecutors presented to the jury. Those are simply not accusations that can properly be retried. Established double jeopardy principles require that these articles be dismissed.[41]

The Constitution, its history, and its subsequent interpretations provide ample support for the view that double jeopardy principles are and should be fully applicable in cases of impeachment, with an exception only for those who are *convicted* of a high crime. The Senate may, however, dispose of the first fifteen articles in this case of impeachment on considerably narrower grounds,

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[41] The House has multiplied these two basic accusations into fifteen articles of impeachment. Whatever the other purposes this fragmentation may serve, the House has not suggested that there are distinctions that might properly be drawn among these articles that would save any from dismissal, if the principle of double jeopardy were found applicable to bar the retrial, in a case of impeachment, of an officer who had been acquitted of the central accusations upon the verdict of a jury. In this view, the Senate should resolve the present motion on fundamental principle. If the principle of double jeopardy bars a second prosecution of an acquitted official in cases of impeachment, all of the first fifteen articles should be dismissed. We believe this position is consistent with sound policy, and, for that reason, we have not burdened this memorandum with an extended discussion of distinctions that should make no difference. Should the House revise its position, we shall, of course, amplify the discussion in our reply.

leaving questions concerning the full scope of the protection that must be afforded to a future case.

In the first instance, the present motion only asks the Senate to prohibit a second trial where the post-acquittal investigations have revealed no material evidence that was not fairly available to the prosecutors at the time the case was first tried. The House has not claimed that it has received or discovered any such evidence: It relies solely upon the fact that there was a large body of evidence available that the prosecutors did not develop or present to the jury at the first trial.[42]

In the second instance, the case against Judge Hastings remains today as it was in 1983—circumstantial. The prosecutors claimed then and the House only claims now that the evidence establishes a chain of events that can be marshalled to support an argument that the judge was a participant in Borders's corrupt scheme. A circumstantial case of this kind is, in its nature, a case that leaves open troubling questions that can never be resolved with certainty, only with finality.

This is not a case in which a post-acquittal investigation has discovered direct and dispositive evidence of guilt that had been concealed from the prosecutors at the time of the first trial. For that reason, this is not a motion that requires the Senate to determine how a case of impeachment that presented that issue should be resolved. The limited rule that the present motion requires the Senate to adopt may be stated thus:

> The core principles embodied in the concepts of double jeopardy and due process preclude a second trial in a case of impeachment, where the House seeks an opportunity to remarshall circumstantial evidence that was available to the prosecution,

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[42] *House Comm. Rep.* at 65–66.

> but not used, in order to seek a conviction on accusations that a jury has rejected.

That modest rule is surely compelled by considerations of policy as well as principle.

The lapse of time and the events that preceded the House's adoption of the Articles of Impeachment provide further grounds and illustrate the need for the proper application of due process principles in this case. They invoke additional constitutional principles evidencing the nation's commitment to fundamental fairness that also bear upon the proper disposition of this case. They also emphasize the narrowness of the precedent that will result.

2. The Lapse of More than Six Years Has Irretrievably Prejudiced the Judge's Right to a Fair Trial, and the Requirements of Fairness Mandated by the Due Process Clause Confirm that These Accusations Must Be Dismissed.

The historical record and the text of the Constitution are admittedly less clear in defining the nature and scope of the other protections that must be accorded the accused in cases of impeachment. We submit that, at a minimum, these other protections must include those rights that have been deemed so basic to the American system of justice and so essential to fundamental fairness that they have been viewed as included within the protections mandated by the due process clause, even in the absence of express specification.[43]

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[43] We do not understand the House to be asserting any claim that the conduct of cases of impeachment need not comport with the essential requirements of due process and fundamental fairness. Nor do we understand the House as disagreeing with the view that the due process clause embodies a commitment that the individual shall be entitled to those guarantees necessary to assure

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The constitutional text and history discussed above establish that cases of impeachment are criminal in nature and, thus, that the protections mandated are of the highest order. The severity of the sanction that may be imposed, a damnation to infamy and a lifetime banishment from any positions of honor and trust, would suffice to compel the same conclusion, however the form of the action were classified. The fact that the rights at stake are constitutional in source and significant to the accused, lifetime tenure and guaranteed compensation, and that those rights were guaranteed to achieve the fundamental public interest in maintaining the independence of the federal courts should foreclose any debate. In that context, the extraordinary delay in initiating this case of impeachment provides further grounds that require that the first fifteen articles be dismissed.

The government filed the indictment that publicly accused Judge Hastings of having been a participant in Borders's corrupt scheme on December 29, 1981. More than six-and-a-half years elapsed between the filing of the indictment that made that accusation and the exhibition of the articles of impeachment that reallege that accusation in this case. The prosecutors publicly accused Judge Hastings of having presented false testimony and fabricated evidence at the trial that ended in early February 1983. More than five years elapsed between the making of those accusations and the exhibi-

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fundamental fairness, whenever the federal government initiates proceedings that may adversely affect his or her rights. Similarly, both parties seemingly agree that the extent of the protections and the kind of procedures mandated depend, in large part, on the nature of the proceedings and the importance of the rights that may be affected. The disagreements stem from their differing views of the nature of cases of impeachment and the importance of the rights at stake.

tion of the articles that reallege those accusations in this case.

All evidence necessary to determine whether further inquiry or action were appropriate was available to the public and the House shortly after the jury returned its verdict. Borders had been tried and convicted, and his conviction had been affirmed by December 1982. The testimony in that case had been transcribed, and the record was complete. The testimony at Judge Hastings's trial was also transcribed throughout the course of his trial, and the record there was also complete. Those records afforded the House advantages in determining whether and how it should proceed far in excess of those it or any holder of prosecutorial discretion enjoys in most cases.

The long interval has increased the House's advantages and prejudiced the judge's right to fairly confront the accusations beyond repair. The House has received such records as the Justice Department chose to gather and preserve as well as those gathered by the Investigating Committee. Some of the sources from which such records could have been obtained had record-retention policies that resulted in the destruction of relevant records long before the Investigating Committee began its hearings in 1985. For example, the House apparently intends to introduce a significant quantity of telephone records to establish that there was a pattern of telephone calls between telephones in Judge Hastings's home and office and Borders's home and office in 1981 that is consistent with a pattern of contacts that would have occurred if Judge Hastings were a participant in Borders's *Romano* scheme.[44] The telephone company

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[44] *House Comm. Report* at 27–28. The available records also establish that the timing of the contacts isolated for the House is

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serving the District of Columbia area, however, had a two-year record retention policy for billing records and was unable to supply complete data for Borders's or other telephones in the District by the time the Investigating Committee requested them.

More important, crucial witnesses have died or their minds have become impaired, including two who appeared at the Judge's trial in 1983. For example: Alvoyd Merritt was a material witness at the judge's trial. Frank Romano was called so the jurors could see him and compare his appearance with that of Rico/Romano. Andrew Mavrides was one of the judge's principal counsel, until a nervous breakdown shortly before trial. He was directly involved in negotiations in which the production of the draft "letters for Hemp" was delayed to apply pressure on the government to produce Dredge, their informant, so that the materiality of his knowledge might be determined. Borders is reported, in the record, to have dealt with two other underworld figures during the relevant period. Santos Trafficante in Miami and Joseph Nesline in Washington. Both men had information the House Committee and Judge Hastings viewed as material.[45] Merritt, Frank Romano (and his codefendant brother, Thomas Romano), Mavrides, and Trafficante are among the dead witnesses. Nesline is re-

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also consistent with the timing of other events that occurred in 1981 that were likely to have required communication between the two men. See *Provisional Report, supra* note 16, at 54–58. Other records through which further events might be reconstructed or recollections refreshed have been long since discarded.

[45] *House Comm. Rep.* at 13–18, 65–66; *compare Provisional Report* at 25–28, 96–118. Some of these witnesses have never been forced to testify; their roles are indicated only by secondary accounts. Their death deprives the judge not only of the right to seek their testimony now, but also of the right ever to confront them.

ported to have Alzheimers disease. All had material information that cannot be recaptured or fairly used.

Most important, the recollection of every witness has necessarily dimmed, and, for many, their testimony has been so often taken that it must be impossible now to determine whether further testimony would evidence recalled knowledge of the underlying events or merely recalled testimony or statements given on prior occasions. The central accusation concerns events that occurred in 1981, *more than seven years ago.* The House has compiled documents showing the contacts between Judge Hastings and Borders that are consistent with the conspiracy theory it advances. The House and Judge Hastings would have to call witnesses who once had knowledge of those events. The House's witnesses include FBI agents who have memoranda to refresh such recollections as they may have and others who have regularly had their testimony rehearsed before the Investigating Committee and in depositions taken by the House's impeachment staff. How is Judge Hastings to confront their testimony effectively more than seven years after the fact? Of greater import, how is Judge Hastings to reconstruct his own recollections and how is he to find witnesses who still recall the events seven years after the fact? [46]

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[46] The concerns are heightened by the House's decision to expand its allegations to include events in 1981 that the prosecutors did not raise at the trial in 1983. For example, the record indicates that several of the dates which the House Committee sees as significant coincide with NBA events in which Judge Hastings and Borders had roles. In 1983, other NBA officials and members might have recalled these events and provided accurate information. They have never been called to testify, and it is unfair to make Judge Hastings's defense dependent upon their present recollection of events they have not been asked to consider for more than seven years.

One requirement of fundamental fairness embodied in the due process clause prohibits the government from delaying too long in bringing charges that accuse a citizen of having committed a high crime or misdemeanor. Standing alone, due process may require that the charges be dismissed if the accused can show the delay has caused actual prejudice to his or her ability to defend against the charges, and the government fails to justify the delays, even where prosecution is not barred by the prescribed statute of limitations.[47] The Supreme Court has made it clear, however, that Congress properly establishes an irrebuttable presumption of improper prejudice in adopting the federal statutes of limitations.[48] The delay in the present case exceeds any delay that could be reconciled with the protections mandated by the due process clause or with the purposes those protections were intended to serve, under either view of the standard to be applied.

Congress has established that the irrebuttable presumption of prejudice arises if offenses of the kind charged in the first fifteen articles are not filed within

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[47] *United States v. Marion,* 404 U.S. 307, 324 (principle recognized); *United States v. Lovasco,* 431 U.S. 783, 789–90 (reaffirming principle and indicating the test is whether compelling respondent to stand trial after governmental delay would violate fundamental conceptions of justice which define " 'the community's sense of fair play and decency' ").

[48] *United States v. Ewell,* 386 U.S. 116, 120–22 (1966) (Statutes of limitation establishes primary means implementing constitutional protection against overly stale charges); *Toussie v. United States,* 397 U.S. 112, 114–15 (1970) (statutes to be construed in favor of repose to implement constitutional purposes); *United States v. Marion,* 404 U.S. 307, 322 (1977) (statutes establish an "irrebuttable presumption that a defendant's right to a fair trial would be prejudiced").

five years of their occurrence.[49] In one view, cases of impeachment are truly criminal, and the statutory limitation should simply be applied. Under a broader view of the constitutional nature of the proceedings, however, the Senate might view the statutes of limitations as declarations of policy creating a presumption that should be applied to give content to the constitutional requirements mandated by fundamental fairness and due process principles in cases of impeachment, absent compelling justification for the delay.

Dismissal of these articles in this case of impeachment would be required under either standard or view. The delay here implicates the precise concerns that have guided Congress in implementing the requirement of prompt indictment and trial through the prescriptions embodied in statutes of limitation and repose:

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity.[50]

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[49] 18 U.S.C. § 3282 (establishing general bar to prosecution of federal offenses, unless indictment is returned within five years).

[50] *Toussie*, 397 U.S. at 114–15, *quoted with approval in Marion*, 404 U.S. at 323. The application of the statutory bar that gave rise to that statement illustrates the importance of the policies declared and the need for their application here. There the Court had before it a citizen whom a jury had found guilty of having willfully failed

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Moreover, the delay here has caused actual, apparent, and substantial prejudice to the accused within the meaning of that standard mandated by the due process clause. The reasons proffered by the House cannot excuse the delay in initiating this case of impeachment if the constitutional requirement is to have any application in any case of impeachment. The only substantive reason proffered is that the delay was attributable in large part to the time consumed by the judiciary in the proceedings it conducted under the 1980 Act. These were not proceedings in which the judiciary was considering new accusations. They were proceedings to see whether additional evidence could be found to support accusations that had been publicly made and that had been rejected by a jury.

The reasons proffered provide no justification for the delay in this case. The accusations that were the subject of the 1983 trial alleged offenses that were criminal by any standard. They were not accusations of the kind over which Congress assigned primary jurisdiction to the judiciary when it adopted the 1980 Act. Congress cannot properly have intended that the House sit on its hands while the judiciary conducted a four-year investigation to determine whether the circumstantial evidence supporting criminal accusations against an ac-

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to register for the draft and who had thereby avoided the possibility of being called to service. The Court recognized that there was merit in the claim that the application of the bar in such a case "is an injustice in a society based upon full and equal application of the laws." Nonetheless, the Court reversed the conviction and ordered that the indictment be dismissed in order to effectuate the overriding purposes established by the statutory definition of policy. Here, the Senate has before it a judge whom a jury acquitted of the accusations the House wishes to reprosecute. The intervening delay confirms that justice to society, as well as the accused, weighs heavily in favor of respecting that verdict.

quitted judge could be expanded and remarshalled to support a claim that the jury was wrong and that the judge's testimony supporting his claim of innocence was false. Congress cannot properly have intended to assign to the judiciary the power to compile and recertify a record that would apply political pressure on the House to re-examine a jury verdict that had stood unchallenged for four years. Congress cannot properly have intended that the exercise of those powers should result in the Senate's being forced to conduct a protracted trial to determine whether additional evidence of guilt could be discerned in the tea leaves of circumstance suggested by evidence that was available, but not presented, at trial—evidence such as that provided in hundreds of pages of long-distance telephone records.

It is here that the House's view of the proper separation of powers precludes acceptance of the arguments it makes. Congress declined to delegate or assign the sole power of impeachment when it adopted the 1980 Act. The House retained the sole power, and with that power it retained also the sole responsibility for its exercise. The fact that the accusations and the evidence supporting them had been made part of the public record in 1983 eliminates any justification for the resulting delay. The House cannot claim it holds the sole power and simultaneously claim that delays occasioned by proceedings in another branch relieved it of responsibility for the timely exercise of that power in this case.

The accusations alleged offenses that constituted high crimes and misdemeanors under both constitutional and legal standards. The 1980 Act could not and did not confer jurisdiction upon the circuit councils and the Conference to impose the only sanctions possible, if such offenses were established. The House deferred to the judiciary to await an advisory opinion on whether it should exercise the sole power of impeachment here.

Such a deferral may be politically attractive; it is, however, constitutionally impermissible, at least when it results in a delay of the magnitude present in this case. It is at this point that the requirements of fundamental fairness combines with those necessary to maintain the proper separation of powers to compel the conclusion that these articles must be dismissed.

B. SEVEN YEARS OF INVESTIGATION AND MORE THAN TWO MILLION DOLLARS IS TOO MUCH: REPROSECUTION OF ACCUSATIONS A JURY REJECTED MORE THAN SIX YEARS AFTER THE FACT CANNOT BE RECONCILED WITH THE GUARANTEES ESTABLISHED TO MAINTAIN THE NECESSARY JUDICIAL INDEPENDENCE.

1. The "New" Precautions for Maintaining Judicial Accountability That Have Been Implemented Over the Past Fifty Years Enhance the Senate's Role and Responsibility as the Final Guarantor of Judicial Independence.

The framers proposed and the people adopted a Constitution that allocated the judicial power to a separate and distinct branch that was to be independent of the other two branches. At the time, this was a revolutionary idea; in retrospect, many have viewed it as the cornerstone which has enabled the Constitution to endure over the past 200 years.

The framers recognized that the judicial department would be the least dangerous and most vulnerable of the three branches of government.[51] In order to protect the federal courts that would exercise the powers of that branch and enable them to perform their constitutional function, the framers proposed to grant institutional protections to the individual judges who would serve on those courts and exercise their powers. The only express provisions adopted to maintain judicial independence were the guarantees of secure tenure and undiminishable compensation for the individual judge

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[51] *See, e.g., The Federalist No. 78* (Hamilton).

and the assignment of the sole powers to attack that security, the power to impeach and the power to try, convict, and thus remove, to the House and the Senate respectively.[52]

Hamilton expressed the framers' views succinctly:

> This provision for the support of the judges bears every mark of prudence and efficacy; and it may be safely affirmed that, together, with the permanent tenure of their offices, it affords a better prospect of their independence than is discoverable in the constitutions of any of the states, in regard to their own judges.
>
> The precautions for their responsibility are comprised in the article respecting impeachments. They are liable to be impeached for mal-conduct by the house of representatives, and tried by the senate, and if convicted, may be dismissed from office and disqualified for holding any other. This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the only one which we find in our own constitution in respect to our own judges.[53]

Those views are reinforced by the views the framers expressed elsewhere concerning the importance of judicial independence and the conditions necessary to maintain it.[54]

The conduct of officers in all three branches evidenced a shared understanding of the Constitution for the first 150 years, an understanding that precluded the

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[52] U.S. Const., art. III, § 1 (tenure and compensation); art. I, § 2, cl. 5 (sole power of impeachment); art. I, § 3, cl. 6 (sole power to try impeachments).

[53] *The Federalist No. 79* at 532–33 (Hamilton).

[54] *See Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1104–11 (D.C. Cir. 1985) (Edwards, J., concurring) (for an eloquent summary).

presentation of the present issue in a prior case of impeachment. The executive never attempted to prosecute a federal judge before the courts. Apart from the established powers to review and issue such writs as were appropriate, the judiciary never claimed or attempted to exercise any powers to regulate or sanction a federal judge.[55] All complaints against judges were submitted directly to the House.[56]

The shared understanding first broke down in 1937, when the executive decided to initiate criminal proceedings against Circuit Judge Marvin Manton. The issue was avoided for a further forty years because the executive exercised its new found prosecutorial discretion carefully. In all but one of the cases, the government obtained a clean conviction. The one ended in two mistrials. The government declined to prosecute further, and the judge resigned to avoid an impeachment inquiry.[57]

The first of the conditions that have caused the issue to arise now and that make its recurrence likely arose in the post-Watergate era. The Justice Department formed its Public Integrity Section with a mandate to aggressively pursue investigations into the conduct of federal officials, including judges. Three federal judges have been prosecuted since 1980. In every case, the government has lost or dropped the major corruption charge. Two judges were convicted on secondary

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[55] The judiciary, of course, had and retains the very substantial informal powers inherent in the pressure that peers may always bring to bear upon one of their number whose conduct significantly departs from the norms they deem appropriate.

[56] The problem could not practically arise with officers in the executive branch because a President who intended criminal prosecution would first dismiss the officer.

[57] *See*, J. Borkin, *The Corrupt Judge* (1962) (for a description of all criminal prosecutions of federal judges through 1962).

charges, and both were so embittered by what they saw as executive misconduct that they refused to resign, hoping to obtain a forum for their grievances in the impeachment process. One judge, Judge Hastings, was acquitted on all charges. It is that first acquittal that created the first condition necessary to force the Senate now to consider and decide an issue that had lain dormant for more than 200 years.

There had, however, been further developments that were necessary to establish and that have established conditions *sufficient* to assure the Senate would be forced to consider the issue. The intervening fifty years had seen the emergence of the "corporate judiciary" in which the Chief Justice and the chief judges became executives who managed the judiciary's affairs through a complex structure of conferences, councils, and committees.

Throughout this period, Congress sporadically considered proposals to expand the bureaucratic powers of these officers and organizations to include formal powers to investigate, sanction, or remove an offending judge, and the judiciary itself made one such attempt.[58] It was the passage of the 1980 Act, in view of the implementation of prosecutorial policies that viewed the risk of acquittal in judicial prosecutions as acceptable, that established the remaining conditions that were necessary to assure that this issue would come before the Senate.[59]

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[58] *See Chandler v. Judicial Council of the Tenth Circuit of the United States*, 398 U.S. 74 (1970); *see also id.* at 89–130 (Harlan, J., concurring) (for a detailed summary of the evolution of the corporate judiciary through that date).

[59] *See Hastings v. Judicial Conference of the United States*, 829 F.2d 91, 109–11 (D.C. Cir. 1987) (Buckley, J., dissenting) (for a former Senator's views of the constitutional and political conse-

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The issue now has come before the Senate in this case. The presence of the conditions that made that possible requires that the Senate re-examine its constitutional role in protecting judicial independence. Such a re-examination confirms that the challenged articles must be dismissed.

2. The Articles Must be Dismissed to Reassure Judges and Remind Officers in All Three Branches That Seven Years is Too Long, That Two Million Dollars is Too Much, and That One Trial is All the Constitution Permits.

In the present case, officials in the executive branch used the resources of the Justice Department, the FBI, and the Grand Jury to investigate and develop their accusations against the judge. They rewarded an established criminal for coming forward with information and accusations. Thereafter, they launched an undercover sting operation to test the accusations. In that operation, they employed the techniques of electronic surveillance as well as an undercover agent to pursue evidence in support of those accusations. One does not need to consider the motives in order to conclude that the initial decision to investigate Judge Hastings and the later decision to arrest Borders before any money had passed were judgments that involved substantial risks and that may be justly criticized.

What has been done to Judge Hastings has been and may be done to other judges. For that reason, any federal district judge called upon to preside over hotly contested disputes between the citizen and the executive must preside aware, in some degree, that, "There, but for the grace of the prosecutor, go I." And the citizen may be forgiven if those circumstances create grounds

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quences of the exercise of the powers conferred by the 1980 Act in the manner done in this case).

which to his or her mind suggest that the judge's "impartiality might reasonably be questioned." [60] The Senate cannot here correct this problem; it can, however, consider it as it bears upon the proper disposition of this motion.

Similarly, the Senate need not here consider the motives or conduct of those who initiated, conducted, and pursued the post-acquittal investigations that created a record to justify the accusations that have now come before the Senate. It can and should consider whether a system that permits and encourages such extended post-acquittal investigations by the judiciary, conducted in a way that assures long delays, is consistent with the policies underlying the Constitution or, indeed, those that the Senate intended be implemented when it adopted the 1980 Act.

The Senate cannot avoid these issues in deciding the present motion. If it denies the motion, it will ratify and encourage the aggressive investigatory and prosecutorial stance the Justice Department and its Public Integrity Section have taken with respect to federal judges. If it denies this motion, it will also ratify and encourage the judiciary to initiate and pursue protracted post-acquittal investigations and to use the powers assigned by the 1980 Act to create a record that might generate sufficient political pressure to precipitate an impeachment. If it denies this motion, it will also send a clear message to every federal judge who harbors independent views that depart significantly from those held by the current executive and by the judges who exercise the powers of the judicial establishment: "Beware lest you incur their wrath, and moderate your views and conduct to conform to their norms: For theirs is the power. . . ."

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[60] A condition that requires disqualification. 28 U.S.C. § 455(a).

The Senate will also send messages if it grants this motion. It will inform officials in all three branches that the precautions established to maintain a judge's independence, as well as those established as precautions for their accountability, must be respected. It will inform those in the executive branch that the discretion to investigate or prosecute a federal judge must be balanced by a consideration of the likelihood and consequences of a failure.

By that decision, the Senate will also send a message to the judiciary. It will inform those who hold the powers conferred by the 1980 Act that their role is limited and that they are to be cautious before they use those powers to intervene in the impeachment process. It will remind them that the right to a jury trial was established as a check on the powers of judges, as well as those of the prosecutors. It will remind them further that the primary jurisdiction over the investigation and trial of judges accused of high crimes and misdemeanors remains in the Congress and that the Congress does not require their assistance in deciding whether the records compiled at a public trial that resulted in a judge's acquittal merit further study and investigation.

Most important, by that decision, it will send messages to those in the judiciary who are the objects of the powers conferred by the 1980 Act: "Seven years was too long; two million dollars was too much; and one trial was enough." That will at least assure them that the powers held by those in the executive and judicial establishments are not without limit, and not without end. That reassurance may be inadequate, but it is the only reassurance the Senate can now afford. We submit that it should be given now.

IV. CONCLUSION

The case against Judge Hastings was, is, and always will be circumstantial. From the outset, Borders and the FBI had a common objective: It was necessary for both that Borders demonstrate that he could cause Judge Hastings to take actions that would create the appearance that he was a participant in Borders's scheme. The FBI's decision to accept the judge's dinner at the Fontainbleau, without more, and its decision to arrest Borders at the scene of the payoff assured that the case would forever remain circumstantial.

A circumstantial case of this kind is one that in its nature forever leaves open questions that will be troubling. Some will find clear evidence of guilt in the tea leaves of circumstance, and the accused's denials and explanations will forever seem hollow and false. Some will believe the accused and his explanations and will forever question the motives of those who set out to create, and to prosecute on the basis of, the appearance of guilt shown by circumstantial evidence. Many will be troubled simply because there are questions that can never be resolved with certainty.

Society confronts many questions which can never be resolved with certainty, but which must be resolved with finality. The constitutional plan we adopted resolves that dilemma by assigning responsibility for deciding those questions with finality to institutions such as the jury. Many may remain troubled after the decision has been made because the questions have not been resolved with certainty; some will remain persuaded that the balance struck by the institution chosen was wrong. Under our constitutional plan, however, we do not permit those concerns to affect the finality of the decision made; they are concerns that are left to those who might urge change in the system for the future and

to historians, commentators, and others engaged in the speculative enterprise. So let it be with Hastings.

The questions raised by the accusations made in the first fifteen articles can never be resolved with certainty. They have been resolved with finality. The prosecutors presented the circumstantial case to a jury and argued that it established guilt. The judge took the stand, proclaimed his innocence, and provided testimony and evidence that provided innocent explanations for the circumstances offered to establish his guilt. He was cross-examined thoroughly and his explanations were challenged fully. In order to convict, the jury would have had to find that the judge's testimony was false and his evidence fabricated, and the prosecutors so argued. The jury did not convict; it acquitted, and in so doing, it rejected the prosecutors' claims.

The framers were aware of the competing ends that had to be accommodated when they assembled in 1787. They knew that men entrusted with power would tend to abuse it. They also knew that the creation of a federal government that might endure would require that men be entrusted with power and afforded protections that would permit them to exercise it effectively. They proposed a constitutional plan that allocated the powers and created protections for those who would exercise them. That plan also included checks and balances to confine the exercise of those powers to their legitimate ends, insofar as they thought feasible, and precautions to assure the responsibility of the officials who would exercise those powers, insofar as they thought necessary and proper. They struck a balance that they acknowledged was imperfect, but that they offered as the best their collective wisdom could offer. The people accepted the wisdom and adopted the plan, and for two hundred years it has worked rather well.

The framers explicitly addressed the competing ends that are the subject of this motion. They established a system by which judges might be impeached and tried for high crimes and misdemeanors and, if convicted, removed and appropriately punished for their conduct. In their view, those were the only precautions consistent with the necessary independence of a judicial character.

The framers also considered traditional tension between the end of subjecting the guilty to proper punishment and protecting the accused from the excesses of power in cases of impeachment. They recognized and labeled those cases as criminal in nature and created one and only one exception to the protection against double jeopardy that that classification mandated—that was a limited exception for a party convicted. The jurisprudence through which we have developed and given content to our commitment to fundamental fairness and to the importance of an independent judiciary confirms the wisdom of that decision as it bears upon the issues that this case of impeachment now presents 200 years later.

Judge Hastings was acquitted by a jury in 1983. The Constitution, its history, the framers' intent, the established jurisprudence, and contemporary needs—all speak with a common voice: Further prosecution or trial on the accusations made in the first fifteen articles is improper. The Senate should so declare by granting the motion and entering an order dismissing those articles with prejudice.

Respectfully submitted,

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ADDENDUM A*

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

Criminal No. 81-596-CR-ETG

UNITED STATES OF AMERICA, PLAINTIFF,

v.

WILLIAM A. BORDERS, JR. AND ALCEE L. HASTINGS, DEFENDANTS.

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

1. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, WILLIAM A. BORDERS, JR., defendant herein, was an attorney living in Washington, D.C.

2. From on or about September 10, 1981 until October 9, 1981 and at all times pertinent to this indictment, ALCEE L. HASTINGS, defendant herein, was a United

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*Reproduced from "Appendix," *Petition for Writ of Certiorari, Hastings* v. *United States*, No. 82-863 (U.S.).

States District Court Judge in the Southern District of Florida.

3. At all times pertinent to this indictment, Paul Rico, a retired agent of the Federal Bureau of Investigation, acted in an undercover capacity for the Government and posed as Frank Romano, who, along with his brother, Thomas Romano, had been convicted by a jury on December 23, 1980 of racketeering charges after a trial before defendant ALCEE L. HASTINGS and had been sentenced by defendant ALCEE L. HASTINGS on July 8, 1981.

4. Beginning on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until on or about October 9, 1981, in the Southern District of Florida and elsewhere, defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did willfully and knowingly combine, conspire, confederate and agree together to:

(a) violate Title 18, United States Code, Section 201(c), to wit: the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS did conspire and agree together corruptly to ask, solicit, seek, accept, receive and agree to receive, directly or indirectly, a sum of money for themselves in return for defendant ALCEE L. HASTINGS being influenced in his performance of official acts as a United States District Judge; and

(b) defraud the United States of America and the people of the United States in connection with the performance of lawful governmental functions:

(1) of and concerning the right of the United States and its citizens to have the lawful functions of the federal judiciary exercised and administered free from corruption, conflict of interest, fraud and obstruction;

(2) of and concerning the right of the United States and its citizens to the conscientious, faithful,

disinterested and unbiased judgments and actions of the defendant ALCEE L. HASTINGS as a United States District Court Judge, free from fraud, corruption, partiality, dishonesty, conflict of interest, and improper influences.

5. It was an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would agree to receive money from criminal defendants who appeared before Judge Hastings in return for promises that Judge Hastings would perform acts in his official capacity on behalf of said criminal defendants.

6. It was also an object of the conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would perform and promise to perform acts to affect cases that were before defendant ALCEE L. HASTINGS, including defendant ALCEE L. HASTINGS making legal rulings and WILLIAM A. BORDERS, JR. giving directions to criminal defendants whom he did not represent, all acts done to facilitate improper payments made by these criminal defendants to defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS.

7. It was part of said conspiracy that defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS would receive $150,000 from someone they believed to be Frank Romano, in return for Judge Hastings reducing the sentences he had previously imposed against the Romano brothers.

8. It was further part of said conspiracy that defendant WILLIAM A. BORDERS, JR. would meet with someone he believed to be Frank Romano, and set the terms of the $150,000 payment.

9. It was further part of said conspiracy between the defendants that the terms of the $150,000 payment would be as follows:

(a) Defendant ALCEE L. HASTINGS would have dinner at 8:00 p.m. on September 16, 1981 at a restaurant in the Miami area selected by the Romanos as proof of defendant ALCEE L. HASTINGS' participation in the bribery scheme;

(b) The Romanos would make an "up front" payment to defendant WILLIAM A. BORDERS, JR. on September 19, 1981 as demonstration of their good faith;

(c) Defendant ALCEE L. HASTINGS would issue an order returning a substantial portion of property owned by the Romano brothers that defendant ALCEE L. HASTINGS had ordered forfeited as part of the criminal penalties imposed against the Romano brothers;

(d) The Romanos would pay the remaining portion of the $150,000 payment;

(e) The Romanos would file a motion to mitigate the three-year prison sentences that had been imposed against them on July 8, 1981 by defendant ALCEE L. HASTINGS; and

(f) Defendant ALCEE L. HASTINGS would re-sentence the Romanos and eliminate the prison sentences he had originally imposed against them.

OVERT ACTS

In furtherance of the conspiracy, the following overt acts, among others, were committed:

1. On or about September 12, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. met with Paul Rico, posing as Frank Romano, and discussed the $150,000 bribe that would be paid to reduce the sentences that had been imposed by defendant ALCEE L. HASTINGS against the Romano brothers.

2. On or about September 16, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS had dinner at the Fontainbleu Hotel on Miami Beach.

3. On or about September 19, 1981, in the Southern District of Florida, defendant WILLIAM A. BORDERS, JR. received $25,000 from Paul Rico, posing as Frank Romano, as good faith "up front" money of the $150,000 payoff.

4. On or about October 6, 1981, in the Southern District of Florida, defendant ALCEE L. HASTINGS issued an order in which he ordered the return of a substantial portion of property belonging to the Romano brothers that he had previously ordered forfeited.

5. On or about October 7, 1981, defendant WILLIAM A. BORDERS, JR. telephoned Paul Rico, posing as Frank Romano, in the Southern District of Florida and requested that Rico come to Washington, D.C. to pay him the remaining $125,000 of the bribe.

6. On or about October 9, 1981, defendant WILLIAM A. BORDERS, JR. met with Paul Rico at a motel in Arlington, Virginia to receive the remaining $125,000 of the bribe.

(In violation of Title 18, United States Code, Section 371)

COUNT II

1. The allegations of paragraphs one through three of this Indictment are realleged herein as though fully set forth.

2. From on or about September 10, 1981 (the exact date being unknown to the Grand Jury) and continuing until October 9, 1981 in the Southern District of Florida and elsewhere, the defendants WILLIAM A. BORDERS, JR. and ALCEE L. HASTINGS, acting unlawfully, willfully and knowingly and aiding and abetting each other, did corruptly influence, obstruct and impede and endeavor to influence, obstruct and impede the due administration of justice in that during the aforesaid period of time:

(a) Defendant ALCEE L. HASTINGS did disclose to defendant WILIAM A. BORDERS, JR. the substance of a judicial order in the case captioned *United States v. Romano,* 78-364-CR-ALH, that had not yet been issued by defendant ALCEE L. HASTINGS;

(b) Defendant ALCEE L. HASTINGS did give to defendant WILLIAM A. BORDERS, JR. advance notice as to when a judicial order in the case captioned *United States v. Romano,* 78-364-CR-ALH, would be issued;

(c) Defendant ALCEE L. HASTINGS did issue an order in the case captioned *United States v. Romano,* 78-364-CR-ALH, wherein the content and timing of said order were consistent with the information defendant ALCEE L. HASTINGS had previously given to defendant WILLIAM A. BORDERS, JR.;

(d) Defendant WILLIAM A. BORDERS, JR. did reveal to an individual he believed to be a defendant in the case captioned *United States v. Romano,* 78-364-CR-ALH, information that had been disclosed to him by defendant ALCEE L. HASTINGS and described in paragraphs (a) and (b) of this Count; and

(e) Defendant WILLIAM A. BORDERS, JR. did instruct an individual he believed to be a defendant in the case captioned *United States v. Romano,* 78-364-CR-ALH, while not representing that individual and knowing that individual to have an attorney, to take various steps, including withdrawing his appeal to the Fifth Circuit, with all said acts done by defendants ALCEE L. HASTINGS and WILLIAM A. BORDERS, JR. to manipulate and interfere with the judicial process in the case captioned *United States v. Romano,* 78-364-CR-ALH, for the purpose of advancing their own private interests.

(In violation of Title 18, United States Code, Section 1503 and 2)

ADDENDUM B*

SPECIFIC PROFFER REGARDING FUNDAMENTAL FAIRNESS QUESTIONS

In a telephone conversation and in a letter delivered to Judge Hastings's counsel on May 23, 1988, Special Counsel's staff indicated that the Subcommittee wished to hear the views of a constitutional scholar with respect to the questions of fundamental fairness that are briefly discussed in Section Seven of the Provisional Report. Judge Hastings's counsel accordingly requested Professor Thomas G. Krattenmaker of the Georgetown University Law Center to review and address the relevant issues.

Professor Krattenmaker was approached for two reasons. First, as his attached *curriculum vitae*, demonstrates, he is eminently qualified to render an opinion on the novel and complex constitutional questions presented by this proceeding.[1] Secondly, Professor Kratten-

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* Submitted to Subcommittee on Criminal Justice of the Committee on the Judiciary of the United States House of Representatives (June 16, 1988).

[1] In addition to the qualifications which are apparent from his *curriculum vitae*, it should be noted that Professor Krattenmaker's advice has also been solicited by federal courts on questions affecting the independence of the judicial branch. *See In re Magwood*, 785 F.2d 1077 (D.C. Cir. 1986), where Professor Krattenmaker was appointed by the court as an *amicus curiae* to address the questions whether bankruptcy judges have the authority to exercise the power of contempt; whether the contempt power is an essential judicial attribute for purposes of Article III of the Constitution; and whether a statute that purported to authorize the exercise of contempt power by non-Article III judges would be constitutional. The *Magwood* court characterized Professor Krattenmaker's presentation as "extraordinarily able and illuminating," and "a resounding tribute to the best attributes of the American system of justice." *Id.*, at 1078.

94-532 O - 89 - 4

maker has had no previous contact with Judge Hastings, his counsel, or this case, and his opinions are, therefore, altogether unaffected by any preconceptions or biases.

After a necessarily abbreviated consideration of the issues presented, it is Professor Krattenmaker's view that the strictures of the Due Process Clause are fully and strictly applicable in an impeachment proceeding against a United States judge. He reaches that conclusion not only from textual analysis, but also from consideration of the functional requirement that impeachments be conducted in a manner that will protect the independence of the federal judiciary.

From that premise, Professor Krattenmaker concludes that the standards of proof are identical or virtually so in a criminal prosecution and in a subsequent impeachment proceeding, and that a judge's acquittal in a criminal trial, although not an absolute bar to a later impeachment, nevertheless raises a strong presumption as a matter of due process that the evidence presented to the criminal trial jury should not be reweighed and that the facts which were litigated in the criminal trial should not be redetermined, absent the discovery of proverbial "smoking gun" evidence which was not available at the time of trial.

Similarly, Professor Krattenmaker believes that due process guarantees limit the ability of Congress to base an impeachment upon stale evidence that was discovered and available long ago. Specifically, he is of the opinion that the present proceeding may well come too late, whether the measuring date is Judge Hastings's indictment in 1981, his acquittal in 1983, or the inception of the Eleventh Circuit investigation shortly thereafter.

Consequently, Professor Krattenmaker concludes that, based upon a combination of the prior acquittal

and the substantial delay between Judge Hastings's indictment and the intiation of this proceeding, principles of due process raise the presumption in this case that the impeachment proceeding against Judge Hastings should not go forward, unless exceptional shortcomings are discovered with respect to the previous criminal trial.

If called as a witness or permitted the time necessary to prepare a more extended statement, Professor Krattenmaker would develop these views in greater detail.

CURRICULUM VITAE

THOMAS G. KRATTENMAKER

April 1988

Professional Experience

1972-Present—Georgetown University Law Center, Associate Professor, 1972-1975, Professor (with tenure), 1975-present (on leave, 1978-1980), Associate Dean for Graduate Studies, 1986-present

1978-1980—Co-Director, Network Inquiry Special Staff, Federal Communications Commission

1971-1972—Chief, Evaluation Division, Bureau of Consumer Protection, Federal Trade Commission

1970-1971—Law Clerk to Justice John M. Harlan, Supreme Court of the United States

1968-1970—Assistant Professor of Law, University of Connecticut School of Law

Education Background

Swarthmore College, B.A., 1965—Phi Beta Kappa. High Honors (with major in economics). General Motors National Scholar. Extracurricular activities included: three letters in varsity baseball; President, Delta Upsilon fraternity chapter; head student resident (proctor) for college dormitory system.

Columbia University School of Law, 1968—Magna cum laude. Notes Editor, Columbia Law Review. E.J. Noble Fellowship. Columbia University International Fellow. Harlan Fiske Stone Scholar. James Kent Scholar. Archie O. Dawson Prize (awarded by faculty to member of graduating class judged likely to be the best advocate).

Principal Subjects Taught

Antitrust Law
Constitutional Law I and II
Supreme Court Seminar
The Federal Courts and the Federal System
Communications Law Seminar

In the Senate of the United States

Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, PLAINTIFF,

v.

THE HONORABLE ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

MOTION TO DISMISS ARTICLE XVII

Respondent United States District Judge Alcee L. Hastings moves that the Senate of the United States enter an order dismissing Article XVII of the Articles of Impeachment exhibited against him by the House of Representatives of the United States. The reasons why dismissal is required and the scope of the order that should be entered are developed below.

REASONS WHY THIS MOTION SHOULD BE GRANTED

There are two reasons why the Senate should dismiss Article XVII. First, the Senate should dismiss this article with prejudice on the ground that it fails to allege a separate "high crime or misdemeanor" within the meaning of the Constitution. Second, the Senate must dismiss this article if it grants Judge Hastings's *Motion to Dismiss Articles I Through XV Without Trial.*[1] We develop these points separately.

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[1] The principles that are developed in the *Memorandum in Support of Motion to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time ("Article I-XV*

Continued

A. ARTICLE XVII DOES NOT ALLEGE A SEPARATE OFFENSE, AND THE SENATE SHOULD NOT PERMIT THE HOUSE TO FURTHER DILUTE THE PROTECTIONS THAT MUST BE ACCORDED AN ACCUSED JUDGE UNDER THE CONSTITUTION.

Prior to the impeachment of Judge Archbald in 1912, the House executed its function by alleging and undertaking to prove facts that stated specific and separate offenses against the United States. This practice enabled the accused to defend himself, confident that he would be acquitted unless the House proved that he had committed one or more of the specific offenses it had alleged to the satisfaction of two thirds of the Senators present on the day of judgment.

That practice clearly conformed to the intent of the framers. The framers had considered and rejected the English practice that permitted removal upon joint address by the two houses of Parliament on the ground that such a legislative process was too political and undermined the necessary independence of officers in the other branches to whom the procedure would apply. The framers settled instead upon the judicial process of impeachment and trial for high crimes and misdemeanors as the procedure for removal that was consistent with the separation and independence necessary to assure the executive and judicial branches could exercise their constitutional functions properly.

Under that practice, the security of a judge could only be attacked if the House isolated acts of specific conduct that constituted one or more high crimes and misdemeanors within the meaning of the Constitution. This restriction did not, of course, restrict the power of the House to allege and the Senate to consider political offenses against the United States that would not have constituted crimes under statutory standards. Nor did it restrict the House from testing and the Senate from de-

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Mem.") also bear upon the issues raised in this motion. We adopt them here and will amplify their relationship at argument.

ciding whether acts that constituted specific breaches of good behavior should be also deemed offenses within the impeachment standard as it applied to judges.[2] Although this left judges vulnerable to a somewhat uncertain standard, it did protect them from impeachments based upon accumulations of dissatisfactions where no specific and substantial offense could be proved.

The traditional practice also accorded with the requirements of fundamental fairness to the accused and placed a modest, but healthy, restraint upon the House and, indeed, upon the Senate. The accused received notice of the specific offenses of which he was accused and was able to use the rules governing relevance and the use of evidence of other acts to limit the House's evidence to that which bore upon the specific offenses the House had alleged. Under that practice, the House did not allege the same offense in different forms. More important, it did not combine the offenses in a manner that permitted cumulative voting in the Senate. The Senators were required to consider the specific offense alleged separately and to vote to convict or acquit on each based upon the evidence before them. Although few would doubt that a spill-over effect may have influenced some votes, the framers' intent and the accused's rights were honored in form and in substance, insofar as that was practicable.

The House has avoided these modest constraints in three impeachments it has brought to the Senate in this century. In each, it has adopted the practice of exhibiting a culminating article that subsumed and collected

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[2] The development of the meaning of "high crimes and misdemeanors" in American impeachment practice is summarized in Impeachment Inquiry Staff, "Constitutional Grounds for Presidential Impeachment," *High Crimes and Misdemeanors: Selected Materials On Impeachment*, 1-26 (1973).

the specific accusations made in the prior articles and alleged them as a separate offense. The practice had no real consequences in the *Archbald* and *Claiborne* impeachments; *Archbald* was acquitted in any event, and *Claiborne* was convicted on other counts. *Ritter* is the only case in which the practice, albeit in a far more restricted form than here, was upheld. We submit that the consequences of the practice in *Ritter*, and the apparent encouragement the House drew from that success as reflected in the articles exhibited in this case, merit the Senate's attention and reconsideration.[3]

In *Ritter*, the House ultimately framed its accusations in seven articles. Six stated separate offenses; the seventh consolidated them all and realleged the combination as a separate offense. The Senate rejected Judge Ritter's motion to dismiss, and the case proceeded to trial. After the trial, Judge Ritter was acquitted of each of the six separate offenses. The votes of those who thought him guilty of one or more were permitted to cumulate in the seventh, and the judge was convicted and removed.[4]

In the present articles, the House has refined and expanded the practice. The articles allege only two independent offenses—that the judge was a participant in a 1981 conspiracy (Article I) and that he improperly disclosed confidential information acquired in the course of

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[3] Arguments similar to those made here were properly advanced by counsel for Judge Ritter. *See Proceedings of the United States Senate in the Trial of Impeachment of Halsted v. Ritter*, S. Doc. 200, 74th Cong., 2d Sess., 39–43 (1936) ("*Ritter Trial Proceedings*").

[4] Some measure of the Senate's concern over this action is evidenced by the dispute over parliamentary procedures that erupted after the vote, *Ritter Trial Proceedings* at 638–41. A further indication may be taken from the fact that the Senate then *unanimously* voted, 76–0, not to impose the further sanction of the future disqualification, *id.* at 641.

his duties in 1985 (Article XVI). The fact that the judge was acquitted in 1983 of the offense alleged in Article I made it necessary for the House to allege that the testimony he provided at the trial that produced the acquittal was false. They have taken the necessity as an opportunity to convert what is essentially a single accusation into fourteen separate articles (Articles II–XV). In itself, this is not a practice the Senate should encourage.

The problems addressed here, however, focus upon Article XVII, and those are problems that the Senate can and should do something about. That article combines the prior sixteen articles in a single count and asks the Senate to consider them as a single offense. That combination violates every principle of fundamental fairness and undermines the integrity and function of the guarantee that no person shall be convicted except upon the concurrence of two-thirds of the Members present.[5] It is redundant, if the Senators convict on any of the offenses alleged in the prior sixteen articles. It is pernicious and unfair, if they acquit on those articles.

The perniciousness is twofold. If there is a trial, some Senators may be persuaded to vote "guilty" on some articles. Were the judge acquitted on all sixteen of the specific offenses charged, Article XVII would invite those who disagreed with the prior verdicts to vote again in the hope that the two-thirds standard might be reached through an accumulation.[6] This would under-

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[5] The principles of fundamental fairness and the function of the constitutional provisions that apply in a case of impeachment are amplified in *Article I–XV Mem.* at 48–66.

[6] Such a practice creates the mathematical possibility that the accused could be acquitted on each of the sixteen offenses by a margin as great as 95–5 and still be convicted on the final article

Continued

mine the two-thirds standard established by the Constitution and would have the effect of converting the impeachment process into a modified form of joint address. Moreover, it would violate fundamental rights that should be enjoyed by the accused in all constitutional trials, including the protection against double jeopardy.[7]

B. ARTICLE XVII MUST IN ANY EVENT BE DISMISSED, IF THE SENATE GRANTS RELIEF UNDER THE MOTION TO DISMISS ARTICLES I THROUGH XV

The House asks the Senate to expose Judge Hastings to jeopardy a third time on three of the specifications included in Article XVII. Those three specifications simply reallege the matters alleged in the first fifteen articles in still a third form.

The first specification alleges that the judge did have "(1) a corrupt relationship with William Borders of Washington, D.C." That simply restates in summary form the accusation made in Article I, the conspiracy article, without further particulars. The second specification alleges in summary form the accusations that the House made in Articles II through XV—that the judge presented "(2) repeated false testimony under oath at [his] trial." The third specification alleges in a new form the accusation made in Article IX—that the draft "letters for Hemp" which the judge produced reflected a "(3) fabrication of false documents which were submitted as evidence at his criminal trial", rather than constituting genuine documents as the judge had testified.

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by a vote of 80-20 as a result of accumulation. Although such an extreme outcome is unlikely, it illustrates the impropriety of the practice.

[7] These points will be amplified in reply and at argument as necessary.

A trial on an article that includes any of those specifications is barred for the reasons developed in the memorandum that accompanied the motion to dismiss the first fifteen articles. Moreover, if that motion were granted, those specifications would have to be stricken to give effect to the Senate's order. The dismissal of the first fifteen articles and the elimination of the first three specifications would leave Article XVII as nothing more than the mirror image of Article XVI. At trial, that article would be both unnecessary and improper. It would not only violate the prohibition against exposing an accused to two convictions for the same offense; it would also expose both the judge and the Senate to an unnecessary and foolish risk of inconsistent verdicts.

CONCLUSION

The foregoing summary should suffice to define the issues that should be addressed by the Senate at argument. It should also suffice to compel the conclusion that Article XVII should be dismissed. If the managers cannot secure the House's objective in sixteen attempts, they should not be encouraged or permitted to insist that they are entitled to repackage their prior accusations as the basis for a seventeenth. If, as we believe, a trial is precluded upon the first fifteen articles, the managers should not be permitted to seek a conviction on a "catch-all" article, when there is nothing to catch.

More important, the multiplication of articles and the use of the catch-all technique reflect a practice by the House that undermines the integrity of the impeachment process as well as the rights of the accused. If the Constitution must be amended, the House and Senate should take the actions necessary to initiate that process. The Senate should not, however, join with the House in practices that have and will tacitly undermine

the integrity of the Constitution in the interim. Article XVII should be dismissed.

Respectfully submitted,

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In the Senate of the United States

Sitting as a Court of Impeachment

In re IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

EXECUTIVE SUMMARY

RESPONSE OF THE HOUSE OF REPRESENTATIVES TO RESPONDENT'S MOTIONS TO DISMISS

I. INTRODUCTION

In Articles I through XV, the House charges Respondent with having participated in a corrupt conspiracy to obtain a bribe in a criminal case pending before him, and with committing multiple acts of knowingly making false statements under oath in order to mislead the trier of fact during the 1983 criminal trial in which Respondent was tried on the conspiracy charge. In his Motion to Dismiss those articles, Respondent asserts that principles of double jeopardy bar Senate action because impeachment is a criminal proceeding. According to Respondent, because he was acquitted by the jury, the Senate cannot now proceed with his impeachment trial. In addition, Respondent contends that the Senate should not proceed with a trial because of the delay between the alleged misconduct and his impeachment by the House of Representatives. With respect to Article XVII, Respondent also contends that by combining the subjects of the preceding articles in an omnibus article, the article fails to allege a separate high crime or mis-

demeanor, and impermissibly permits "cumulative" guilty votes.[1]

II. Double Jeopardy Principles Do Not Apply

A. The constitutional doctrine of separation of powers mandates an impeachment process that is separate and independent of the judicial branch

Respondent's double jeopardy argument is incompatible with the very structure of our Government. Neither the Senate nor the House of Representatives can defer to the Judicial Branch in a matter which is their unique constitutional responsibility. The doctrine of separation of powers and the system of checks and balances established by our Constitution require the Congress to exercise its independent judgment in an impeachment proceeding, irrespective of the outcome of a prior criminal or civil case.

Moreover, the doctrine of separation of powers also prohibits the Senate from delegating to the Judicial Branch its impeachment authority. The Supreme Court has emphasized that neither the Judicial Branch, nor any other branch of the Federal Government may be "assigned nor allowed 'tasks that are more appropriately accomplished by [other] branches.' "

The Senate has recognized these fundamental constitutional principles and refused to defer to a decision of the Judicial Branch in lieu of exercising its unique constitutional responsibility. In the impeachment trial of Judge Harry Claiborne, for example, the Senate Impeachment Trial Committee refused to rely on the criminal conviction of Judge Claiborne. The same reasoning was applied by the Senate Select Committee on

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[1] Respondent has not moved to dismiss Article XVI, which pertains to the wiretap disclosure allegation.

Ethics with respect to expulsion proceedings concerning Senator Harrison A. Williams, Jr.

B. IMPEACHMENT IS NOT A CRIMINAL PROCEEDING WARRANTING APPLICATION OF THE DOUBLE JEOPARDY CLAUSE

The central and explicit premise underlying Respondent's double jeopardy argument is that a Senate impeachment trial is a criminal proceeding. Then, and only then, would principles of double jeopardy apply. Respondent's premise is without merit.

1. Relevant Legal Analysis

The Fifth Amendment provides in pertinent part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . ." The double jeopardy clause has been held to apply to all criminal matters irrespective of the outcome of a criminal trial.

It is also settled law that the double jeopardy clause does not apply to non-criminal proceedings, even if those proceedings are based upon the same facts which resulted in a criminal acquittal. In determining whether the double jeopardy clause applies to a particular proceeding, therefore, the Supreme Court distinguishes between remedial and punitive proceedings.

Numerous proceedings have been deemed remedial in nature, even though the impact of the judgment is highly negative to the financial and personal interests of the individual involved. Thus, the courts have permitted forfeiture, disbarment, deportation and parole revocation proceedings based upon the same facts resulting in a criminal acquittal.

The threshold question, therefore, is whether an impeachment proceeding is essentially remedial in nature and thereby unaffected by the double jeopardy clause, or is a criminal, punitive proceeding to which the double jeopardy clause applies. A review of the text

of the Constitution, the historical evidence, analysis by experts in the field of constitutional law, and pronouncements of both the House and the Senate regarding the nature of an impeachment proceeding, lead to the conclusion that the sanctions are remedial rather than punitive and that the Framers did not intend impeachment to be criminal in nature.

a. The Framers intended impeachment to be a non-criminal proceeding

Article I, Section 3, Clause 7 of the Constitution provides:

> Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to law.

In the impeachment judgment clause, therefore, the Framers contemplate a dual process where impeachment would be available to remove an offending official from public office, but the Executive Branch would retain its jurisdiction to proceed with a criminal prosecution, if appropriate.

Other Constitutional provisions that address the nature of impeachment also indicate that it was not the intent of the Framers that impeachment be considered a criminal proceeding. For example, even though impeachment is grouped with "Crimes" and "offenses" in two provisions of our Constitution, it is mentioned solely for the purpose of excluding impeachment from the protections created for criminal matters in those provisions: There is no right to a jury trial in an impeachment, while a right to trial by jury is a fundamental precept of our criminal jurisprudence; the President cannot pardon the official convicted in an impeachment

proceeding, a power the President has in criminal cases. Thus, the Constitution treats impeachment separately from criminal proceedings.

Although some language of the Constitution suggests connections between impeachment and the criminal process, e.g. the Senate "convicts" on charges of "Treason, bribery or other high Crimes and Misdemeanors," these references stem from the fact that the English system of impeachment, to a limited extent, served as a model for the Framers. English impeachments were unquestionably criminal proceedings. However, in this and other critical respects the English model was rejected, rendering the American impeachment a remedial process.

The separation of functions between impeachment and criminal proceedings has been commented upon many times by some of the most distinguished constitutional scholars in our nation's history. Repeatedly, they reach the same fundamental conclusion: the purpose of impeachment is not to punish an individual, but to protect the institutions of government from persons who have abused their positions of public trust. That protection is effected by removing such federal officials from office and, in some instances, barring them from holding future office. This analysis also supports the conclusion that, as established by the Framers, impeachment is a non-criminal proceeding.

b. The history of the double jeopardy clause does not support Respondent's argument

A review of the proceedings surrounding the adoption of the Constitutional amendment embodying the double jeopardy clause supports the conclusion that the Framers intended impeachment to be a remedial proceeding not subject to the principles of double jeopardy. The deletion of the specific exemption for impeachment from James Madison's proposed double jeopardy clause re-

flects no more than a removal of language deemed unnecessary in view of the existing provisions of the Constitution which had already taken impeachment outside the scope of double jeopardy. Similar treatment was afforded Madison's proposal with respect to trial by jury which had included a specific exemption for impeachment.

c. The constitutional sanctions for impeachable conduct are not punitive

Even if the intent of the Framers were found to be ambiguous, application of the established judicial test to determine whether double jeopardy principles are applicable would lead to the same conclusion that they are not.

When determining whether a statutory or regulatory proceeding is remedial in nature, and therefore subject to the protections of the double jeopardy clause, the courts look beyond the intent of the drafters to determine whether the sanctions imposed in the particular proceeding are such that the proceeding itself must be considered punitive rather than remedial. Here, the question is whether the sanctions imposed by the Senate upon conviction of an impeachable offense are such that impeachment must be considered punitive. The answer is no.

In the Constitution, the Framers established limited sanctions for a Federal official found guilty of an impeachable offense: "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States." On their face, these sanctions are remedial. Removal from office and future disqualification are remedies unique to impeachment proceedings; they cannot be imposed by any court as a punishment for criminal conduct. They affect only a limited number of individuals (the President, Vice President and civil officers of the United States) and

relate only to their continued or future tenure in Federal office. In addition, the remedies afforded the Senate focus on the needs of the public and the nation rather than on punishment of the accused individual.

2. Both the House and the Senate have recognized the non-criminal nature of impeachment

Respondent's fundamental premise that impeachment is a criminal proceeding has been rejected by both the House and the Senate. Over a hundred years ago, in 1873, the House Committee on the Judiciary explored the nature of impeachment in connection with the impeachment inquiry of Vice President Colfax. Their report concluded, "impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive. . . ."

In the Claiborne impeachment trial, the Senate recognized the distinction between impeachment and criminal proceedings when it determined that the criminal standard of proof—beyond a reasonable doubt—does not necessarily apply in an impeachment trial.

Finally, in the recent Report of the Senate Committee on Rules and Administration on what procedures to employ in this impeachment case, the issue of the nature of impeachment was considered. The Committee stated, "Most important, it must be remembered that an impeachment should not be viewed as a criminal prosecution."

Thus, not only the relevant legal analysis and historical precedent establish that impeachment is a remedial proceeding, but also the House and Senate have reached the same conclusion in this and other proceedings. Respondent's double jeopardy argument should be rejected because it rests on the faulty premise that impeachment is criminal in nature.

III. THERE HAS BEEN NO UNWARRANTED DELAY BETWEEN THE ALLEGED OFFENSES AND RESPONDENT'S IMPEACHMENT

The offense charged in Article I, the alleged bribery conspiracy between Judge Hastings and William Borders, occurred in 1981. The offenses charged in Articles II through XV, the alleged perjury committed by Judge Hastings at his criminal trial, occurred in February 1983. Seven and five years later respectively, on August 3, 1988, the House of Representatives impeached Judge Hastings for these and other offenses.

There is no statute of limitations applicable to articles of impeachment, for neither the Constitution nor House or Senate rules require that articles be adopted by the House or presented to the Senate within any particular length of time. Therefore, as a matter of law, Articles I through XV cannot be dismissed due to the time that has passed since the commission of the offenses. Rather, Judge Hastings must be raising the equivalent of an equitable defense of laches, which requires a showing of inexcusable and unreasonable delay prejudicial to the defendant.

In fact, the doctrine of laches, too, does not apply to the Federal government. However, even assuming, *arguendo,* that a laches defense were to apply to the House of Representatives, Respondent's delay argument has no merit. First, the time period between the commission of the alleged offenses and Judge Hastings' impeachment falls well within historic precedent. For example, in the impeachment of Judge Charles Swayne, two of the six articles alleged offenses that occurred more than twelve years prior to the impeachment. Most recently, in the impeachment of Judge Harry Claiborne, six years elapsed between the misconduct and impeachment. In both cases, the Senate convicted on these articles.

Second, the adoption of Articles I through XV was timely, proceeding in accordance with the procedures established by Congress in the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980. Finally, much of the time elapsed stems from litigation initiated by Respondent or engendered by his opposition to the disclosure of grand jury and other documents.

The fact that evidence has been available since Judge Hastings' arrest and criminal trial does not require the House of Representatives to impeach him immediately. There is no such constitutional requirement and, as illustrated by the investigation conducted in this case by the Eleventh Circuit pursuant to the 1980 Act, a thorough and unbiased study of the allegations is advisable, even though time consuming. This is especially true in a case such as this, in which the respondent challenges in court many aspects of the judicial and congressional investigations.

The 1980 Act establishes a mechanism through which any citizen can initiate a complaint and a respondent's own peers review the allegations. Using such a procedure weeds out frivolous complaints and creates an initial record from which the House may launch its own investigation. The House, of course, may proceed with an impeachment without a Judicial investigation. Respondent, however, is arguing that the House is required to bypass the very mechanism created by Congress to investigate claims against Federal judges. This is an untenable position.

Respondent's claim that he has been prejudiced by delay is also without merit. Nearly all of the witnesses who will testify with respect to Articles I through XV have testified under oath in other proceedings. The House will stipulate to the authenticity of this testimony. Three of the unavailable witnesses named by Respondent, were never even called by Respondent at his

criminal trial, nor does he explain in any detail why their testimony is now so "crucial" to his defense. The other two unavailable witnesses listed by Respondent have had their sworn testimony recorded in previous trials.

IV. The Omnibus Article Pleads a Separate Offense

Article XVII follows a practice begun in the last century of not merely pleading one or more impeachable offenses, but asserting that a course of behavior involving several forms of misconduct has damaged the body politic. Such omnibus articles have formed the basis for all the impeachment convictions in the twentieth century.

In the American experience, a total of only five persons, all of them judges, have been impeached and convicted by the Congress. Three of those men (Judges Archbald (1912–1913), Ritter (1933–1936) and Claiborne (1986)) were tried and convicted on so-called "omnibus" articles of impeachment.

Thus, in every impeachment trial in the twentieth century which resulted in conviction, the Senate has convicted on an article that included several acts of misconduct, including acts that were separately alleged in other articles. A conviction on the "omnibus" article is a recognition by the Senate that such a formulation of charges is proper, and that the pattern of behavior alleged therein is a separate basis for removing the official from office.

The case of Judge Halsted Ritter is most instructive here, since the omnibus article was challenged by the respondent on the same grounds as raised here. Judge Ritter asserted that when the Senate voted on the omnibus article, it would have already voted on the previous articles, and

> The object and purpose of such an arrangement can be but to cumulate adverse votes, if any, upon prior articles, with the hope that the cumulative or collective arrangement may be sufficient to sustain those articles in the vote upon the final article . . .

The Managers responded that the article raised

> . . . a substantial doubt as to [Judge Ritter's] judicial integrity. . . . We contend that this is the highest crime which a judge can commit on the bench. It is not whether he did this thing, that thing, or the other thing, but whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer.

The Senate acquitted Judge Ritter on each of the preceding articles, but found him guilty only of the omnibus article. A point of order was raised that the conviction was improper because of the acquittal on the substantive charges of the preceding articles. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII in which Respondent is charged with general misbehavior. It is a separate charge from any other charge."

In the same sense, Article XVII herein is a charge separate and distinct from the preceding articles. Indeed, in the present proceeding, an even stronger case can be made that the omnibus article is a separate charge. Although it generally pertains to conduct that is also alleged in the preceding articles, Article XVII does not merely refer to those articles, but sets forth specific conduct which has undermined confidence in the Federal judiciary. Moreover, the recitation of conduct in Article XVII differs in several respects from that described in the previous articles.

As in previous impeachments resulting in conviction, the final article in this case alleges general misconduct

resulting in the undermining of the Federal judiciary. Although in the instant case, each act of misconduct individually constitutes reprehensible behavior totally at odds with continued service as a Federal judge, the gravamen of Article XVII is that the sum total of the individual acts is destructive to the judiciary. History attests to the fact that a pattern of misconduct is a separate basis for conviction and removal from office.

Accordingly, for the reasons set forth above, Respondent's Motion to Dismiss Articles I through XV, and his Motion to Dismiss Article XVII should be rejected.

Respectfully submitted,

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FEBRUARY 24, 1989.

In the Senate of the United States

Sitting as a Court of Impeachment

In re IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

RESPONSE OF THE HOUSE OF REPRESENTATIVES TO RESPONDENT'S MOTION TO DISMISS ARTICLES I THROUGH XV

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FEBRUARY 24, 1989.

TABLE OF CONTENTS

	Page
I. Introduction	123
II. Respondent's Impeachment Trial Should Proceed Because Double Jeopardy Principles Do Not Apply	125
A. The Constitutional Doctrine Of Separation Of Powers Mandates An Impeachment Process That Is Separate And Independent Of The Judicial Branch	126
B. Impeachment Is Not A Criminal Proceeding Warranting Application Of The Double Jeopardy Clause	131
1. Relevant Legal Analysis Establishes That Principles Of Double Jeopardy Do Not Apply To Impeachment Proceedings	131
a. The Framers Intended Impeachment To Be A Non-Criminal Proceeding	133
b. The History of the Double Jeopardy Clause Does Not Support Respondent's Argument	143
c. The Constitutional Sanctions For Impeachable Conduct Are Not Punitive	146
2. Both the House and the Senate Have Recognized the Non-Criminal Nature of Impeachment	148
III. There Has Been No Unwarranted Delay Between The Alleged Offenses and Respondent's Impeachment	152
A. Historic Precedent Refutes Respondent's Argument of Delay	154
B. The Time Between The Alleged Misconduct And Impeachment Was Reasonable And Justified	155
C. A Defense Of Unwarranted Delay Does Not Apply To The House of Representatives	160
IV. Conclusion	161
Appendix	163

In the Senate of the United States

Sitting as a Court of Impeachment

In re IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

RESPONSE OF THE HOUSE OF REPRESENTATIVES TO RESPONDENT'S MOTION TO DISMISS ARTICLES I THROUGH XV

I. INTRODUCTION

In this impeachment proceeding, the House of Representatives has presented to the Senate seventeen Articles of Impeachment against United States District Judge Alcee L. Hastings. After an exhaustive review of the evidence, the House concluded by an overwhelming vote of 413 to 3, with 4 voting present, that Judge Hastings (hereinafter referred to as "Respondent") has engaged in misconduct that warrants removal from office.

Respondent has filed before the Senate two motions in which he argues that sixteen of the Articles of Impeachment should be dismissed prior to trial. The House Managers address Respondent's Motion to Dismiss Articles I through XV in this memorandum. The Managers address his Motion to Dismiss Article XVII in a separate memorandum filed contemporaneously.

In Articles I through XV, the House charges Respondent with having participated in a corrupt conspiracy to obtain a bribe in a criminal case pending before him, and with knowingly making false statements under oath in order to mislead the trier of fact during his 1983 criminal trial on the conspiracy charge. In his Motion to Dismiss Articles I through XV, Respondent asserts that principles of double jeopardy bar Senate action because impeachment is a criminal proceeding. According

to Respondent, because he was acquitted by the jury, the Senate cannot now proceed with his impeachment trial. In addition, Respondent contends that the Senate should not proceed with a trial because of the delay between the alleged misconduct and his impeachment by the House of Representatives.

The Senate should reject both of these arguments. The trial on Articles I through XV should proceed because the prohibition against double jeopardy does not apply to an impeachment proceeding. Respondent's double jeopardy argument, in fact, is inconsistent with the constitutional structure of our Government, misapplies the historic precedent and ignores the relevant legal analysis. Similarly, the Senate should reject Respondent's delay argument, because the time that has elapsed between the commission of the alleged misconduct and Respondent's impeachment is a product of two factors: the litigation occasioned by Judge Hastings' objections to the proceedings leading up to his impeachment, and the diligence and care with which the various institutions involved in this matter have handled the inquiry. In any event, the time lapse between the events in question and this impeachment falls well within the historic precedent of other impeachment proceedings.

As established by the Framers of our Constitution, the Senate has the responsibility of resolving impeachment proceedings, including the issue of whether the trial in this case should proceed on all seventeen articles. When deciding Respondent's Motions to Dismiss, the Senate, like courts of law, must assume as true the allegations contained in the Articles of Impeachment. In other words, to grant Respondent's motions, the Senate must determine that the trial on Articles I through XV and Article XVII should not proceed even assuming Respondent has conspired to accept a bribe,

lied repeatedly under oath and conducted himself in a manner that undermines the integrity of the Federal bench, as alleged by the House of Representatives.

Finally, in support of his Motion to Dismiss Articles I through XV, Respondent included an extensive Statement of Facts responding to the Statement of Facts in the Report of the Committee on the Judiciary which accompanied the House impeachment resolution.[1] For the convenience of the Senate, the Managers include in the attached Appendix the Statement of Facts from the Committee Report addressing the bribery and perjury allegations.[2]

II. Respondent's Impeachment Trial Should Proceed Because Double Jeopardy Principles Do Not Apply

In his Motion to Dismiss Articles I through XV, Respondent asserts that his impeachment trial is barred by the doctrine of double jeopardy. He alleges that an acquittal by a jury in an earlier criminal case precludes the Senate from proceeding with this impeachment. The consequence of Respondent's position is that even if one concludes that Respondent conspired to take a bribe, knowingly testified falsely under oath, and undermined the integrity of the Federal judiciary, the Senate cannot exercise its unique constitutional responsibility of protecting the institutions of government from those who abuse public office.

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[1] *See* Memorandum in Support of Motion to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time (hereinafter referred to as "Respondent's Memorandum") at 17.

[2] The Statement of Facts in the Committee Report also sets forth the facts underlying Article XVI, which charges Respondent with disclosing confidential wiretap information. Because neither of Respondent's Motions to Dismiss directly addresses this article, the House Managers do not include this portion of the Committee statement.

94-532 O - 89 - 5

Respondent's argument is without merit and should be rejected. It is inconsistent with the very structure of our constitutional Government. Moreover, it rests upon the erroneous premise that an impeachment trial is a criminal proceeding. Respondent's view has been considered and rejected by the Senate, as well as by numerous distinguished constitutional scholars. If an impeachment trial is deemed a criminal proceeding, a wrenching and unwarranted departure from two centuries of our nation's constitutional history would ensue, affecting far more than the instant case.

A. THE CONSTITUTIONAL DOCTRINE OF SEPARATION OF POWERS MANDATES AN IMPEACHMENT PROCESS THAT IS SEPARATE AND INDEPENDENT OF THE JUDICIAL BRANCH

A fatal flaw with Respondent's double jeopardy argument is its incompatibility with the very structure of our Government. Respondent contends that the Senate is bound by a jury verdict of acquittal and, therefore, it must dismiss the Articles of Impeachment. Neither the Senate nor the House of Representatives, however, can defer to the Judicial Branch in a matter which is within its unique constitutional responsibility. The doctrine of separation of powers and the system of checks and balances established by our Constitution require the Congress to exercise its independent judgment in an impeachment proceeding, irrespective of the outcome of a prior criminal or civil case.

As the Supreme Court recently stated,

> This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers

> into three coordinate Branches is essential to the preservation of liberty.[3]

It is beyond dispute that the Framers set up a system of checks and balances to ensure that no branch of the Federal Government becomes too powerful and that all are held accountable.[4] For example, legislation passed by Congress can be vetoed by the President and is subject to a review of its constitutionality by the courts. Similarly, Senate confirmation is a precondition to Presidential appointment of Federal judges, and the sole check on lifetime tenure in office is Congress' impeachment power. Even when a Federal judge is convicted of a crime, he or she cannot be removed from office without Senate action.

Respondent asks the Senate to ignore this system, to disrupt the checks and balances crafted by the Framers, by allowing a jury to have the final say on whether a Federal judge should remain on the bench. The Framers, however, rejected such a result. They specifically bypassed the Judicial Branch in favor of the Senate when determining what body should be vested with the power to remove Federal officials.[5]

The doctrine of separation of powers also prohibits the Senate from delegating to the Judicial Branch its impeachment authority. The Supreme Court has emphasized that neither the Judicial Branch, nor any other branch of the Federal Government may be "assigned nor allowed 'tasks that are more appropriately accomplished by [other] branches.' "[6] As stated by the Court,

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[3] *Mistretta v. United States*, 57 U.S.L.W. 4102, 4107 (January 18, 1989).

[4] *Id.*

[5] Hamilton, *The Federalist, No. 65* at 426–427 (Mod. Lib. Ed.).

[6] *Mistretta v. United States, supra* at 4103 *citing Morrison v. Olson*, 56 U.S.L.W. 4385 (June 29, 1988).

> That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power.[7]

In two analogous situations, the Senate has recognized these fundamental constitutional principles and refused to defer to a decision of the Judicial Branch in lieu of exercising its unique constitutional responsibility. In the impeachment trial of Judge Harry Claiborne, the House asked the Senate to apply the doctrine of collateral estoppel by accepting as true the facts found in Judge Claiborne's criminal case, which in turn supported conviction on the Articles of Impeachment.[8] The Senate Impeachment Trial Committee refused to rely on the judicial findings. The Chairman of the Committee, Senator Charles Mathias, stated:

> The managers ask the Senate to bind itself to the judgment of the courts of the United States . . . Now, there might be very compelling considerations if the Senate were simply sitting as another court, but the evidence is that the framers of the Constitution deliberately constructed a system which would result, in Alexander Hamilton's phrase expressed in Federalist No. 65, in a "double prosecution" . . .
>
> The Senate has the "sole power to try all impeachments." We have no authority to delegate that responsibility to any other branch. Particularly it must be remembered that the Constitutional Convention specifically rejected the idea of

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[7] *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

[8] B. Reams, Jr. and C. Gray, *The Congressional Impeachment Process and the Judiciary: Documents and Materials on the Removal of Federal District Judge Harry E. Claiborne* 169–187 (1987).

> conferring on the Supreme Court the power to try impeachments.
>
> If our obligation to try all impeachments results in the expenditure of our time and resources or creates the possibility that our conclusions may differ from those of the judiciary in exercising our separate constitutional responsibilities, that would be a result of the Framers' design and not of our personal wishes.
>
> Accordingly, we are obliged to continue and not interrupt our assignment of receiving the evidence which the Senate may later use when it performs its duty as the sole trier of fact in this impeachment.[9]

Similarly, the Senate Select Committee on Ethics emphasized the Senate's responsibility to exercise its independent constitutional authority in its report on a resolution to expel Senator Harrison A. Williams, Jr.[10] The Committee's report explains:

> The committee's unanimous recommendation of expulsion reflects its strong conviction that its

---

[9] *Id.* at 108–110. Moreover, there is even less reason in this case than in that of Judge Claiborne to defer to the jury verdict. In Judge Claiborne's criminal case, the jury found beyond a reasonable doubt that the judge had committed the crimes alleged. In other words, the jury was convinced that the evidence satisfied the stringent standard of proof applied in criminal proceedings. In contrast, in Respondent's criminal case, all the jury found was that there was a "reasonable doubt" as to Respondent's guilt. It did not determine that the evidence presented established his innocence.

Moreover, it should not be forgotten that in a separate trial William Borders was convicted of conspiring with Respondent to obtain a bribe. For the jury to reach that conclusion, it must have determined, beyond a reasonable doubt, that Judge Hastings participated in the bribery scheme.

[10] This situation is analogous to that of impeachment because the Senate's authority to expel its members also derives directly from a Constitutional provision independent of Executive Branch authority to prosecute a crime. *See* Article I, Section 5.

> own determination of the matter and that of the Senate must be made independently of the jury's verdict, [the court's] rulings on due process motions, and indeed, any action which any court may take with regard to Senator Williams' case.[11]

Likewise, Senator Heflin, who was the ranking minority member of the Senate Ethics Committee in the Williams' case, remarked:

> Many people . . . misunderstand the role of our committee and the nature of disciplinary proceedings.
>
> When the jury returned a verdict of guilty, many said that should dictate our result; but with our own independent constitutional obligation to discharge with our own standards of conduct and individual concepts of right and wrong, nothing external to this body can ever dictate our result: not prosecutors, not juries, not judges, not appeals courts.
>
> While our higher standard makes it highly probable that the conviction of a crime would constitute an ethical impropriety warranting sanctions, that is nonetheless an independent, case-by-case determination.
>
> Likewise, had Senator Williams been found not guilty or were his conviction to be overturned on an appeal, it would still be possible for him to have violated the Senate's "Code of Conduct."
>
> The Constitution clearly contemplates, and it would constitute no repugnant result for there to be no conviction but yet expulsion.[12]

The same is true in this case. The Constitution demands that the Senate exercise its independent judgment and not defer to a jury verdict in cases of impeachment. The Senate should not place in the hands of the Judicial Branch its own constitutional authority.

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[11] S. Rep. No. 97-187, 97th Cong., 1st Sess. 10 (1981).

[12] 128 Cong. Rec. S.1459 (March 3, 1982).

The Senate alone has the power to determine whether a Federal judge should remain on the bench.

B. IMPEACHMENT IS NOT A CRIMINAL PROCEEDING WARRANTING APPLICATION OF THE DOUBLE JEOPARDY CLAUSE

The central and explicit premise underlying Respondent's double jeopardy argument is that a Senate impeachment trial is a criminal proceeding. Then, and only then, would principles of double jeopardy apply.[13] The House submits that Respondent's premise is without merit. In fact, his view has been considered and rejected by the Senate, as well as by numerous distinguished constitutional scholars. Impeachment is a remedial proceeding, which is not criminal in nature and, therefore, the doctrine of double jeopardy does not apply.

1. Relevant Legal Analysis Establishes That Principles Of Double Jeopardy Do Not Apply To Impeachment Proceedings

Consideration of Respondent's argument must begin with an analysis of the double jeopardy clause in the Fifth Amendment to the Constitution. The Fifth Amendment provides in pertinent part, ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

The law governing the applicability of the double jeopardy clause has been extensively developed by the Supreme Court. *In Ex Parte Lange*,[14] the Court stated:

> The common law not only prohibited a second punishment for the same offense, but it went further and forbid a second trial for the same offense, whether the accused had suffered punish-

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[13] Respondent's Memorandum at 9, 50.

[14] 18 Wall. 163, 169 (1873).

> ment or not, and whether in the former trial he had been acquitted or convicted.

Thus the double jeopardy clause applies to all criminal matters irrespective of the outcome of a criminal trial.

It is also settled law that the double jeopardy clause does not apply to non-criminal proceedings, even if those proceedings are based upon the same facts which resulted in a criminal acquittal. In *Helvering v. Mitchell,*[15] the Supreme Court, per Justice Brandeis, rejected the idea that the double jeopardy clause barred imposition of a monetary penalty in a subsequent proceeding where a criminal trial based upon the same facts had resulted in an acquittal. An "acquittal on a criminal charge is not a bar to a civil action by the Government, *remedial in its nature,* arising out of the same facts on which the criminal proceeding was based. . . ." [16] In determining whether the double jeopardy clause applies to a particular proceeding, therefore, the Supreme Court distinguishes between remedial and punitive proceedings.

Numerous proceedings have been deemed remedial in nature, even though the impact of the judgment is highly negative to the financial and personal interests of the individual involved. In *United States v. One Assortment of Firearms,*[17] the owner of various firearms had been acquitted in a criminal trial, but the Supreme Court held that the double jeopardy doctrine did not prohibit a subsequent forfeiture proceeding against the firearms involved in the criminal case. In *Lewis v. Frick,*[18] the defendant's criminal acquittal did not bar subsequent deportation proceedings for the same acts.

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[15] 303 U.S. 391, 398–404 (1938).

[16] *Id.* at 397 (emphasis added).

[17] 465 U.S. 354 (1984).

[18] 233 U.S. 291 (1914).

In *Helvering v. Mitchell,* the Supreme Court, noting the different standards of proof in criminal and civil proceedings, held that acquittal in a tax evasion trial did not bar a subsequent civil assessment suit. Indeed, double jeopardy has been found not to attach even where confinement may be imposed in the second proceeding.[19]

The threshold question, therefore, is whether an impeachment proceeding is essentially remedial in nature and thereby unaffected by the double jeopardy clause, or is a criminal, punitive proceeding to which the double jeopardy clause applies. A review of the text of the Constitution, the historical evidence, and analysis by distinguished scholars and experts in the field of constitutional law, leads to the conclusion that the Framers did not intend impeachment to be criminal in nature and the sanctions are remedial rather than punitive.

a. The Framers Intended Impeachment To Be A Non-Criminal Proceeding

The first source for determining the intent of the Framers regarding the nature of impeachment is the Constitutional language itself. Article I, Section 3, Clause 7 of the Constitution, known as the impeachment judgment clause, provides:

> Judgment in cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment according to Law.

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[19] *See Standlee v. Rhay,* 557 F.2d 1303 (9th Cir. 1977) (acquittal in a criminal trial did not bar subsequent parole revocation based on same charges).

The House submits that this language alone establishes that the essential nature of impeachment is non-criminal, that the sanction is remedial rather than punitive, and that impeachment proceedings are outside the scope of the double jeopardy clause.

A persuasive indication of the Framers' intent to establish impeachment as a remedial process is that criminal prosecution remains available following a Senate conviction. In the impeachment judgment clause, the Framers contemplate a dual process where impeachment would be available to remove an offending official from public office, but the Executive Branch would retain its jurisdiction to proceed with a criminal prosecution, if appropriate. Alexander Hamilton commented on this feature of the Constitution in *The Federalist, No. 65* during his discussion of the appropriate forum for an impeachment trial. Hamilton wrote that the judiciary was ill-suited to serve as a court of impeachment because the accused would then lose the benefit of his "double trial," in that the same branch of government would have jurisdiction over both the impeachment and the criminal case.[20] In designing a two-part scheme, the Framers implicitly acknowledged that impeachment and criminal prosection are independent and that the latter is not a substitute for the former.

In addition to the impeachment judgment clause, there are other Constitutional provisions that address the nature of impeachment. A review of these references also indicates that it was not the intent of the Framers for impeachment to be considered a criminal proceeding.[21]

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[20] *See The Federalist, No. 65, supra* at 426.

[21] The other Constitutional provisions that address impeachment are:

Article I, Section 2, Clause 5:

Continued

For example, even though impeachment is grouped with "Crimes" and "offenses" in two provisions of our Constitution, it is mentioned solely for the purpose of excluding impeachment from the protections created for criminal matters in those provisions. Thus the Constitution treats impeachment separately from criminal proceedings. There is no right to a jury trial in an impeachment, while a right to trial by jury is a fundamental precept of our criminal jurisprudence. The President cannot pardon the official convicted in an impeachment proceeding, a power the President has in criminal cases.

It is true that some language of the Constitution suggests connections between impeachment and the criminal process. Thus, the Senate "convicts" in an impeachment trial and the standard for impeachable conduct—"Treason, bribery or other high Crimes and Misdemean-

---

> The House of Representatives . . . shall have the sole Power of Impeachment.
>
> Article I, Section 3, Clause 6:
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.
>
> Article II, Section 2, Clause 1:
>
> The President . . . shall have Power to grant Reprieves and Pardons for offenses against the United States, except in Cases of Impeachment.
>
> Article II, Section 4:
>
> The President, Vice President and all civil Officers of the United States, shall be removed from office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.
>
> Article III, Section 2, Clause 3:
>
> The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; . . . .

ors"—suggests criminal activity.[22] These references, however, stem from the fact that the English system of impeachment, to a limited extent, served as a model for the Framers. Only certain aspects of the English model were adopted; in other critical respects the English model was rejected, rendering the American impeachment a remedial process.

English impeachments were unquestionably criminal proceedings even though they did not require an indictable crime.[23] Impeachment in England was a "double-edged sword; it was used not only to sever a man from his office, but also his head from his body." [24] This was the great watershed distinction between the English and American practices:

> One thing that the writers of the American Constitution made clear, however, was that no matter how much they were following the footsteps of their English predecessors, the impeachment process was not to be the alternative to, or a substitute for, criminal proceedings. They did this both by restricting the sanctions that might be applied to removal from office and also by providing

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[22] Article II, Section 4.

[23] The term "High Crimes and Misdemeanors," in fact, is not limited to criminal activity. At the time of the drafting of the Constitution, the term incorporated misconduct that was not subject to criminal prosecution. In the American experience, ten officials impeached by the House of Representatives were accused of misconduct that did not constitute a crime.

As Senator Byrd recently explained:

> . . . "[H]igh Crimes and Misdemeanors" appear to be words of art confined to impeachments, without roots in the ordinary criminal law and which had no relation to whether an indictment would lie in the particular circumstances.

133 Cong. Rec. S. 8380 (June 19, 1987).

[24] Kurland, *Watergate, Impeachment, and the Constitution*, 45 Miss. Law Journal, 531, 537 (1974).

> that conviction on impeachment did not preclude further ordinary criminal proceedings.
>
> This basic difference between the American and the English processes requires that the English precedents be scrutinized with a wary eye. For in many ways the English procedures are truly criminal in ways that the American procedures clearly are not.[25]

Impeachment is also distinguished from criminal proceedings in the way that it is initiated and tried. As established by the Framers in Article I, Section 2, Clause 5, the House of Representatives initiates an impeachment trial by way of articles, rather than by a grand jury returning an indictment. It is the Senate, not courts of law, that has jurisdiction over impeachment trials.

This separation of functions between impeachment and criminal proceedings has been commented upon many times by some of the most distinguished constitutional scholars in our nation's history. Repeatedly, they reach the same fundamental conclusion: the purpose of

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[25] *Id.* at 538. At least one scholarly work on impeachment posits that the English influence was substantially less than is generally credited and points out the fundamental differences between the English and American concepts of impeachment. For example, Parliament refused to limit its jurisdiction by defining impeachable offenses, while the Framers of the Constitution labored to define impeachable offenses with precision. Only office holders could be impeached under the federal provisions, while in England, only the royal family was immune from impeachment. In England, the House of Lords could convict by a bare majority. In the American Constitution, the unique formula of "two thirds of the members present" became the rule. Finally, and perhaps most importantly, the House of Lords could order any punishment upon conviction including death. The delegates to the Convention limited themselves to non-criminal remedies which could not be imposed by any regular court. *See* Hoffer and Hull, *Impeachment in America*, 1635–1805 (Yale 1984).

impeachment is not to punish an individual, but to protect the institutions of government from persons who have abused their positions of public trust. That protection is effected by removing such federal officials from office and, in some instances, barring them from holding future office. This analysis also supports the conclusion that, as established by the Framers, impeachment is a non-criminal proceeding.

One can begin with Hamilton's explication of the Constitution's impeachment provisions in *The Federalist, No. 65:*

> A well-constituted court for the trial of impeachments is an object not more to be desired than difficult to be obtained in a government wholly elective. The subjects of its jurisdiction are those offences which proceed from the misconduct of public men or, in other words, from the abuse or violation of some public trust. They are of a nature which may with peculiar propriety be denominated POLITICAL as they relate chiefly to injuries done immediately to the society itself. . . .
>
> What, it may be asked, is the true spirit of the institution itself? Is it not designed as a method of NATIONAL INQUEST into the conduct of public men? [26]

Thus the essence of the offense for which impeachment is appropriate is not merely criminal activity, but rather such conduct which constitutes "the abuse or violation of some public trust." Hamilton went on to state that only the Senate would be sufficiently "unawed or uninfluenced" to serve as a tribunal for an impeachment.[27]

Professor Philip Kurland, in analyzing Hamilton's writings in *The Federalist, No. 65,* observed:

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[26] *The Federalist, No. 65, supra* at 423-424.

[27] *Id.* at 425.

> There is certainly not to be found here any intimation that the function of impeachment is to afford a tribunal for the trial of criminal offenses. Hamilton is rather suggesting that the reason for not utilizing a court for the trial of impeachments is exactly because the issues are so different from those that are meet for the ordinary criminal law processes.[28]

Similarly, Justice Joseph Story, writing in 1833, spoke of impeachment as "a proceeding purely of a political nature. It is not so much designed to punish an offender as to secure the state against gross official misdemeanors. It touches neither his person nor his property, but simply divests him of his political capacity" [29]

Justice Story's comments echo the words of James Wilson, generally viewed as the finest legal mind at the Constitutional Convention. Wilson wrote:

> [I]mpeachments . . . come not . . . within the sphere or ordinary jurisprudence. They are founded on different principles, are governed by different maxims, and are directed to different objects, for this reason, the trial and punishment of an offense on an impeachment, is no bar to a trial and punishment of the same offense at common law.[30]

In his writings, Wilson also stated that impeachment was "confined to political characters, to political crimes and misdemeanors and to political punishments." [31]

Modern scholars and commentators have examined the issue of the non-criminal nature of impeachment. Like the early commentators, they too have concluded uniformly that impeachments are intended to protect

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[28] Kurland, *supra* at 547.

[29] J. Story, *Commentaries on the Constitution of the United States*, § 803, at 586–87 (5th ed. 1905).

[30] J. Wilson, *Works*, 452 (1804).

[31] *Id.* at 166.

the institutions of government from abuses of the public trust, and were not intended to be criminal proceedings. Impeachment, as established by the Framers, is a remedial process:

> [B]eing a political process, impeachment should not be viewed as a duplication of the criminal process. The impeachment process was designed to be neither a criminal proceeding, nor, in a strictly technical sense, a juridical trial. Removal from office cannot be viewed as criminal punishment or its equivalent. To hold otherwise would be to assume that an office holder was possessed of an indefeasible property interest in the office.[32]

Professor Raoul Berger, when replying to the argument advanced by former President Nixon's counsel that our impeachment process is criminal in nature, wrote:

> When [President Nixon's counsel] emphasizes the criminal nature of impeachment in England, he overlooks that there it was part and parcel of a criminal proceeding. The separation of the two in our Constitution demands a construction of impeachment in non-criminal terms lest it fall afoul of other constitutional provisions.
>
> First, there is double jeopardy. Were impeachment criminal in nature . . . a conviction or acquittal on impeachment would bar a criminal indictment and a prior conviction or acquittal on indictment would bar an impeachment, for no man can be tried twice for the same offense. Both [James] Wilson and [Justice] Story were aware of the play of double jeopardy in the Constitutional provision. *The Framers meant to have both impeachment and indictment available, not to put*

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[32] Furmage and Mangrum, *Removal of the President: Resignation and the Procedural Law of Impeachment*, 1974 Duke L.J. 1023, 1029.

> *Congress to a choice between either one or the other.*[33]

Similarly, Professor Kurland made the following observations about the remedial nature of impeachment:

> It is not insignificant that the concern of the Convention from the beginning and throughout was centered on a means for removal from office and not on punishment for misbehavior.
>
> * * * * *
>
> The purpose of the [impeachment] provision is clear. It is not punishment of an individual for criminal activity, but removal from office for abuse of authority.[34]

In his Memorandum, Respondent argues the opposite conclusion. He contends that the language of the Constitution suggests that impeachment is a criminal proceeding and, therefore, principles of double jeopardy apply. His analysis of the Framers' intent is without support.

In his memorandum, Respondent relies on the impeachment judgment clause. He argues that this constitutional provision establishes one exception to the prohibition against double jeopardy, which covers the case of a "convicted" official. The Constitution, he contends, "creates an express exception for a '*party convicted*' of an impeachable offense. It creates no exception for a party *acquitted*." [35]

Respondent is forced to take this position regarding the Framers' intent because otherwise his double jeopardy argument would create the anomaly of prohibiting impeachments following the criminal *conviction* of civil officers. Thus it would mean that Harry Claiborne

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[33] Berger, *The President, Congress and the Courts*, 83 Yale L.J. 1111, 1143–44 (1974) (emphasis added; footnotes omitted).

[34] Kurland, *supra* at 541, 545.

[35] Respondent's Memorandum at 49 (emphasis in original).

should be returned to the bench, indeed that he never was constitutionally removed from office. It would also mean that the pending impeachment inquiry involving Judge Walter Nixon, who is currently in jail serving a sentence for conviction on two counts of perjury, should be terminated. If the impeachment process is a criminal proceeding, they too should not be subjected to another trial.

Recognizing the dilemma created by his thesis, Respondent is forced to take a wholly novel and unsupported position which twists the language of the Constitution. No tailor can cut the constitutional fabric to fit this argument. The fallacy of his analysis is apparent on its face, for the term "party convicted" in the impeachment judgment clause clearly refers to civil officers whose impeachment trial has resulted in conviction. It has nothing to do with judgments in a criminal proceeding. It offers no support to Respondent's anomalous contention that persons acquitted in a criminal trial are protected by the double jeopardy clause, while those convicted are subject to a subsequent impeachment proceeding.

Contrary to Respondent's assertion, the language of the Constitution establishes that impeachment is a remedial proceeding. The specific constitutional provision that criminal prosecution could follow an impeachment conviction, the functional distinctions between impeachments and criminal trials, and the analysis of Constitutional scholars all establish beyond reasonable question the intent of the Framers to create a remedial, noncriminal impeachment proceeding.[36]

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[36] The original report and recommendation of the Eleventh Circuit Investigating Committee in the instant case, which was approved by the Judicial Council of the Eleventh Circuit, specifically addressed the issue of whether double jeopardy would bar an im-

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b. The History of the Double Jeopardy Clause Does Not Support Respondent's Argument

Respondent also asserts that the adoption of the Constitutional amendment embodying the double jeopardy clause supports the conclusion that the Framers intended impeachment to be a criminal proceeding not subject to the principles of double jeopardy. A review of that history, however, demonstrates this is not the case.

In the House of Representatives, James Madison offered a series of constitutional amendments which included the following proposition:

> No person shall be subject, except in cases of impeachment, to more than one punishment or one trial for the same offense; nor shall be compelled to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor be obliged to relinquish his property, where it may be necessary for public use, without a just compensation.[37]

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peachment after acquittal in a criminal case. The five distinguished judges who sat on the Investigating Committee unanimously concluded that principles of double jeopardy did not apply. *See* Appendix I, Serial No. 11, *In the Matter of the Impeachment of U.S. District Judge Alcee L. Hastings*, at 347.

The basis for the Investigating Committee's conclusion echoes many of the grounds set forth above. The Committee pointed out,

> . . . impeachment does not serve the same purpose as a criminal prosecution. Impeachment is remedial and designed to protect the institution of government from corrupt conduct; conduct that subverts the foundations upon which such institutions rest, namely the trust of the people in the integrity of the constitutional officers of the United States Government. This difference is an important reason why double jeopardy principles are not applied to an impeachment proceeding.

Id. at 348.

[37] 1 *Annals of Congress* 433 (June 8, 1789).

This proposition was taken up and debated by a Committee of the Whole of the House of Representatives. None of the debate referred to the clause "except in cases of impeachment." [38] Madison's proposal, with some amendments, was adopted by the House on August 20, 1789 and was included in the double jeopardy clause reported from the House to the Senate.[39]

According to an entry in the Senate Journal from September 4, 1789, the proposal was further amended by the Senate as follows:

> The eighth article was then considered, and after a successful motion to strike out these words: 'except in case of impeachment, to more than one trial, or one punishment;' and substitute these words: 'be twice put in jeopardy of life or limb by any public prosecution;' it was agreed to.[40]

There is no history of any debate on this amendment. As adopted by both houses, the language read:

> . . . nor shall any person be subject for the same offense, to be twice put in jeopardy of life or limb. . . .

On the basis of this history, Respondent argues that the deletion of the specific language exempting impeachment from the double jeopardy clause reflects a decision to leave impeachment within those cases covered by the double jeopardy provision. There is no history or commentary to support this position.

It is, in the view of the House, substantially more likely that the deletion of the specific exemption for impeachment from the double jeopardy clause, reflects no

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[38] 1 *Annals of Congress* 753 (August 17, 1789).

[39] 1 *Annals of Congress* 767 (August 20, 1789).

[40] 2 Senate Journal (September 4, 1789), *quoted in* 2 Schwartz, B., *The Bill of Rights: A Documentary History (1971)*, at 1147, 1149.

more than a removal of language deemed unnecessary in view of the existing provisions of the Constitution which had already taken impeachment outside the scope of double jeopardy.

In this connection, it is noteworthy that Madison's seventh proposition also had a reference to impeachment which was deleted prior to final adoption of the Amendments. There, as with the double jeopardy provision, impeachment was initially specifically excluded as a proceeding to which the right to trial by jury would attach. That proposition, which stated basic safeguards accompanying criminal trials, was as follows:

> The trial of all crimes (*except in cases of impeachments*, and cases arising in the land or naval forces, or the militia when on actual service, in time of war or public danger) shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites; and in all crimes punishable with loss of life or member, presentment or indictment by a grand jury shall be an essential preliminary. . . .[41]

In the final version of the amendments, the explicit exception for cases arising in the military was retained, but the exception for impeachments was deleted.[42] It is

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[41] *Annals of Congress, as quoted in 2 Schwartz*, at 1027. (emphasis added).

[42] In the form in which the amendments were finally adopted, the protections named in the seventh proposition appeared in Articles VII and VIII, the Fifth and Sixth Amendments.

> Art. VII. [Fifth Amendment] No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger . . .

Continued

reasonable to assume that with regard to both the protection against double jeopardy and the right to trial by jury, the drafters of the Bill of Rights were of the opinion that it was obvious from the terms of the Constitution that those rights guaranteed by the Fifth and Sixth Amendments in all criminal matters, were not applicable to impeachment trials. Therefore both the original language of the Constitution and the amendments made to the Constitution by the First Congress reflect an understanding on the part of the Framers that impeachment was not a criminal proceeding subject to the principles of double jeopardy.

c. The Constitutional Sanctions For Impeachable Conduct Are Not Punitive

The House submits that the evidence of the Framers' intent that impeachment be a non-criminal proceeding and not subject to double jeopardy principles is compelling and conclusive. However, even if this intent were found to be ambiguous, application of the established judicial test to determine whether double jeopardy principles are applicable would lead to the same conclusion.

When determining whether a statutory or regulatory proceeding is criminal in nature, and therefore subject to the protections of the double jeopardy clause, the courts look beyond the intent of the drafters to determine whether the sanctions imposed in the particular proceeding are such that the proceeding itself must be

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Art. VIII [Sixth Amendment] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law; and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

considered punitive rather than remedial.[43] Here, the question is whether the sanctions imposed by the Senate upon conviction of an impeachable offense are such that impeachment must be considered punitive. The answer is no. Indeed, the sanctions established by the Constitution for impeachable conduct reinforce the conclusion that impeachment is non-criminal in nature. For this additional reason, Respondent's double jeopardy argument fails.

In the Constitution, the Framers established limited sanctions for a Federal official found guilty of an impeachable offense. Article II, Section 3 provides that the Senate's only remedy upon conviction on an Article of Impeachment is "removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States."

On their face, these sanctions are not punitive. Removal from office and future disqualification are remedies unique to impeachment proceedings; they cannot be imposed by any court as a punishment for criminal conduct. They affect only a limited number of individuals (the President, Vice President and civil officers of the United States) and relate only to their continued or future tenure in Federal office. In addition, the remedies afforded the Senate focus on the needs of the public and the nation rather than on punishment of the accused individual. Unlike a criminal proceeding where the sentence imposed must be relative to the crime, in cases of impeachment only the remedies of removal and disqualification are available, no matter how serious the offense.

In addition, consideration of other factors suggested by the Supreme Court indicate that the impeachment

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[43] *United States v. Ward*, 448 U.S. 242, 248, *reh. denied*, 448 U.S. 916 (1980).

sanctions are remedial. The Supreme Court has characterized proceedings as remedial even if the impact of the sanction imposed has a significant detrimental impact on the individual involved.[44] Thus, courts have permitted disbarment and licensing revocation proceedings following a criminal acquittal on the same facts—proceedings which carry sanctions that may destroy an individual's employment opportunities and reputation.[45] Likewise, the Supreme Court has held that deportation, which imposes the most wrenching of disabilities, separating the subject from family, friends, and livelihood, is not a punitive sanction.[46]

Moreover, impeachment sanctions share the characteristics of a remedial or regulatory sanction: they have not been historically regarded as punishment; nor do they require that the conduct be criminally proscribed; and removal and disqualification are tailored to protect the public trust. No more appropriate remedy could be fashioned to accomplish that limited purpose.

2. Both the House and the Senate Have Recognized the Non-Criminal Nature of Impeachment

Finally, Respondent's fundamental premise that impeachment is a criminal proceeding has been rejected by both the House and the Senate. For this reason too, Respondent's double jeopardy argument fails.

Over a hundred years ago, in 1873, the Committee on the Judiciary of the House of Representatives had occa-

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[44] *See* text accompanying notes 17 to 19.

[45] *See Office of Disciplinary Counsel v. Campbell*, 345 A.2d 616 (Pa. 1975), *cert. denied*, 424 U.S. 926 (1967) (acquittal did not bar attorney disciplinary action). *Young v. State Bd. of Registration for Healing Arts*, 451 S.W.2d 346 (Mo. 1969), *cert. denied*, 397 U.S. 922 (1970) (physican's license revocation proceeding for performing an unlawful abortion not barred by prior acquittal on criminal charges for the same offense).

[46] *Lewis v. Frick, supra.*

sion to explore the nature of impeachment and the sanction of removal in a report issued in the impeachment inquiry of Vice President Colfax. The report explains:

> Your committee, therefore, are led to inquire, what is the nature and what the objects of impeachment under our Constitution?
>
> Are they punitive or remedial? . . . Your committee are very strongly inclined to the opinion that impeachment was intended by the framers of the Constitution to be wholly remedial and not punitive, except as an incident to the judgment, because we find that the Constitution limits the judgment in impeachment by strongly restrictive words . . . .
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> * * * * *
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> . . . [W]e find impeachment to be remedial in this, that it only provides as a further consequence disqualification for office, by which the evil is cured . . . .
>
> We are also inclined to believe that proceedings of impeachment were intended to be remedial and not punitive, because we have already seen that if punitive at all an entirely inadequate punishment has been provided by the judgment; because the very highest offenses are triable by impeachment, such as treason and bribery, and the sentence may be only removal from an office whose term extends for a few days only, as in the case under consideration.[47]

More recently, during the impeachment inquiry into the conduct of former President Nixon, the difference between impeachment and the criminal law was expressed thus:

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[47] H. Rep. No. 81, 42nd Cong., 3rd Sess. (1873) *reprinted in Impeachment, Selected Materials*, 93rd Cong., 1st Sess. 601, 605–606 (1973).

> Impeachment and the criminal law serve fundamentally different purposes. Impeachment is the first step in a remedial process—removal from office and possible disqualification from holding future office. The purpose of impeachment is not personal punishment; its function is primarily to maintain constitutional government. Furthermore, the Constitution itself provides that impeachment is no substitute for the ordinary process of criminal law since it specifies that impeachment does not immunize the officer from criminal liability for his wrongdoing.[48]

In the Claiborne impeachment trial, the Senate recognized the distinction between impeachment and criminal proceedings when it determined that the criminal standard of proof—beyond a reasonable doubt—does not necessarily apply in an impeachment trial.[49]

Finally, in the recent Report of the Senate Committee on Rules and Administration on what procedures to employ in the impeachment case of Respondent, the issue of the nature of impeachment was considered. The Committee stated:

> Most important, it must be remembered that an impeachment should not be viewed as a criminal prosecution. "The impeachment process was designed to be neither a criminal proceeding, nor in a strictly technical sense, a juridical trial." Hamil-

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[48] Staff Report, *Constitutional Grounds for Presidential Impeachment*, 93rd Cong., 2nd Sess. 24 (1974).

[49] Judge Claiborne filed a motion in the Senate to designate "beyond a reasonable doubt" as the standard for conviction in the Senate. The Senate rejected the motion by a vote of 75 to 17. Senator Mathias stated, "It is the Chair's determination that the question of standard of evidence is for each Senator to decide individually when voting on Articles of Impeachment." *Proceedings of the United States Senate in the Impeachment Trial of Harry S. Claiborne*, S. Doc. 99-48, 99th Cong., 2d Sess. at 148.

ton characterized it as a method of "National Inquest" into the conduct of public men.

The proposition that impeachment proceedings are not criminal trials is also evident from previous actions of this Committee. In 1974, the Rules Committee held hearings on the subject of whether the Senate Impeachment Rules would be revised. Among the proposals presented to the Committee was one by Senator Mansfield which set out comprehensive, detailed rules of procedure which were "substantially modeled" on the civil and criminal rules of procedure for federal courts. The Committee did not adopt the Mansfield proposal; instead it made minor changes in the existing rules.

One change made by the Committee is particularly important. Rule VIII was amended to substitute the words "person impeached" for "person accused" or "accused." The report explains that ". . . there was a general feeling among the members of the Committee that the language of the rules should accord with the *sui generis* nature of impeachment and should, therefore, avoid terminology closely allied with criminal proceedings."

There are many distinctions between an impeachment and a criminal prosecution. For example, Senators are both judge and jury, and admissibility of evidence may be determined by vote of the Senate. Members, not the parties, decide if Members are qualified to hear the case, and Senators have an unlimited right to pose written questions to witnesses and counsel. Also, during the Claiborne trial, the Senate rejected a motion that would have imposed on all Members a single standard of proof for conviction.

In the Claiborne case, both the impeachment committee and the full Senate rejected the motion that they were in any sense bound by the outcome of the criminal prosecution against Judge Claiborne. The Constitution provides further evidence that this view is consistent with that of its authors where it specifically permits criminal pros-

> ecution of a person impeached. In any event, in view of the foregoing, the acquittal of the respondent is irrelevant to the questions before this Committee.[50]

Thus not only the relevant legal analysis and historical precedent establish that impeachment is a remedial proceeding, but also the House and Senate have reached the same conclusion in this and other proceedings.

There is no basis for Respondent's assertion that impeachment is a criminal proceeding requiring the application of principles of double jeopardy. History makes clear that the Framers intended impeachment to be a remedial proceeding, serving the important purpose of preserving the integrity of Federal office to the benefit of the public. The legal analysis adopted by the Supreme Court also demonstrates that impeachment is remedial and, therefore, double jeopardy does not apply. In addition, the Senate and the House have adopted this view of impeachment proceedings.

Accordingly, the Senate should reject Respondent's argument that the doctrine of double jeopardy requires the Senate to dismiss Articles I through XV of the Articles of Impeachment.

III. There Has Been No Unwarranted Delay Between the Alleged Offenses and Respondent's Impeachment

In his Motion to Dismiss Articles I through XV, Respondent also asserts that dismissal of these articles is warranted due to the lapse of time between the alleged offenses and his impeachment by the House of Representatives. The offense charged in Article I, the alleged bribery conspiracy between Judge Hastings and William Borders, occurred in 1981. The offenses charged in Articles II through XV, the alleged perjury committed by

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[50] S. Rep. 101–1, 101st Cong., 1st Sess. 73 (1989).

Judge Hastings at his criminal trial, occurred in February 1983. Seven and five years later respectively, on August 3, 1988, the House of Representatives impeached Judge Hastings for these and other offenses.

There is no statute of limitations applicable to articles of impeachment, for neither the Constitution nor House or Senate rules require that articles be adopted by the House or presented to the Senate within any particular length of time.[51] Therefore, there is no support for the assertion that, as a matter of law, Articles I through XV should be dismissed due to the seven and five years that have passed since the commission of the offenses. Rather, Judge Hastings must be raising the equivalent of an equitable defense of laches—that the House of Representatives is guilty of inexcusable and unreasonable delay prejudicial to the respondent in this impeachment proceeding.[52] The House takes issue, however, with Respondent's assertion that the House of Representatives unreasonably delayed this case.

Assuming, *arguendo*, that a laches defense were to apply to the House of Representatives,[53] Respondent's delay argument has no merit. First, the time period between the commission of the alleged offenses and Judge Hastings' impeachment falls well within the bounds of precedent in prior impeachments. Second, the adoption of Articles I through XV was timely, proceeding in accordance with the procedures established by Congress in

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[51] For this reason, as well as because an impeachment trial is not a criminal proceeding, the federal statute of limitations for bribery and perjury does not apply. Nor, for that matter, is there any type of presumption that a delay of more than five years is improper. Respondent offers no historical support for such an argument. *See* Respondent's Memorandum at 71–73.

[52] *Costello v. United States*, 365 U.S. 265, 282 (1961); *Gardner v. Panama Railroad*, 342 U.S. 29 (1951).

[53] In fact, the doctrine does not apply. *See* discussion, *infra*.

the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (hereinafter referred to as "1980 Act"). Finally, much of the time lapse stems from litigation initiated by Respondent or engendered by his opposition to the disclosure of grand jury and other documents.

A. HISTORIC PRECEDENT REFUTES RESPONDENT'S ARGUMENT OF DELAY

In the American experience, there have been at least three impeachment proceedings in which the time between the charged offenses and the adoption of articles was the same or greater than the five and seven years at issue in this case. In the impeachment of Judge Charles Swayne, two of the six articles alleged offenses that occurred more than twelve years prior to the impeachment.[54] Similarly, in the impeachment of Judge Halsted Ritter, the alleged offenses occurred five to seven years prior to the House of Representatives' adoption of articles.[55] Most recently, in the impeachment of Judge Harry Claiborne, the offense alleged in Article I occurred on June 15, 1980, six years before the House adopted the article on July 22, 1986.[56] In short, the Senate has never dismissed Articles of Impeachment on the basis of unwarranted delay.

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[54] The House impeached Judge Swayne on January 18, 1905, while the offenses charged in Articles IV and V occurred in 1893. Similarly, over ten years passed between 1894, the year of the offense charged in Article VI, and Judge Swayne's impeachment. *Impeachment of Charles Swayne, Proceedings in the House of Representatives (1903-1905)*, 66th Cong., 2nd. Sess. 635 (1912).

[55] The House adopted seven Articles of Impeachment against Judge Ritter on March 2, 1936. Articles I through VII alleged misbehavior occurring in 1929 through 1931. *Official Conduct of Judge Halsted L. Ritter, Trial and Impeachment, 1933-1936* at 628.

[56] S. Doc. 99-48, 99th Cong. 2d Sess. 2 (1986).

B. THE TIME BETWEEN THE ALLEGED MISCONDUCT AND IMPEACHMENT WAS REASONABLE AND JUSTIFIED

When a court is presented with a delay defense, it looks at all the factors or circumstances relevant to the given case in order to determine its validity.[57] Here there has been no unreasonable or inexcusable delay by the House of Representatives. In fact, just the opposite is true.

Article I focuses on the bribery conspiracy which took place in 1981. Articles II through XV focus on the false testimony that occurred at Judge Hastings' criminal trial in February, 1983. The delay between Respondent's indictment on December 29, 1981 and his trial in February 1983 is largely attributable to a motion to dismiss, filed by Judge Hastings, which alleged that a federal judge must be impeached prior to a criminal prosecution. Judge Gignoux, the trial judge in the case, denied Respondent's motion and severed Respondent's trial from that of codefendant Borders in order to allow Respondent to pursue an interlocutory appeal. Judge Gignoux's decision was affirmed by the Eleventh Circuit. The appeal by Judge Hastings delayed his trial for eleven months.

Immediately following Judge Hastings' trial, on March 17, 1983, William Terrell Hodges, Chief Judge of the United States District Court for the Middle District of Florida, and Anthony A. Alaimo, Chief Judge of the United States District Court for the Southern District of Georgia, filed a complaint with the United States Court of Appeals for the Eleventh Circuit. The complaint was initiated under 28 U.S.C. 372(c) of the 1980 Act. The Chief Judge of the Eleventh Circuit thereupon appointed an Investigating Committee, consisting of five judges.

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[57] *Gardner v. Panama Railroad Co., supra,* at 30-31; *Bott v. Four Star Corp.,* 807 F.2d 1567, 1576 (Fed. Cir. 1986).

Litigation initiated by Judge Hastings or engendered by his opposition to the Investigating Committee's efforts to obtain documents and testimony delayed the Investigating Committee's hearings and other fact finding for over a year and a half: Judge Hastings challenged the constitutionality of the 1980 Act and the statutory authority of the Investigating Committee, he opposed the Investigating Committee's attempt to obtain grand jury materials from his criminal case, and he opposed the Investigating Committee's motion to compel the testimony of witnesses who asserted a "judicial privilege" based on their employment by Judge Hastings. Judge Hastings lost all of these points, but the litigation effectively stalled the investigation.[58]

On August 4, 1986, the Investigating Committee submitted its report and recommendation to the Judicial Council for the Eleventh Circuit and, on August 29, 1986, the Judicial Council adopted a resolution in which it accepted and approved the report. Four days later, on September 2, 1986, the Eleventh Circuit certified the Hastings matter to the Judicial Conference of the United States, after which, on September 17, 1986, the Judicial Conference invited Judge Hastings to respond.

Thereafter, on March 17, 1987, Chief Justice Rehnquist, acting on behalf of the Judicial Conference, transmitted to the Speaker of the House of Representatives a certification that, in language taken from 28 U.S.C. 372(c), the Judicial Conference had determined that Judge Hastings had "engaged in conduct which might

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[58] The Investigating Committee initiated efforts to obtain grand jury records in June, 1983. Judge Hastings' opposition prevented the Committee from gaining access to those records until October, 1984. In May, 1985, the Investigating Committee sought the testimony of Judge Hastings' law clerks and secretary. Judge Hastings opposed the subpoenas. His opposition delayed the witness' appearance before the Investigating Committee until July, 1986.

constitute one or more grounds for impeachment." The certification and the accompanying report of the Investigating Committee were referred to the Committee on the Judiciary on March 23, 1987. The Committee, in turn, referred the inquiry into the conduct of Judge Hastings to the Subcommittee on Criminal Justice.

Less than a year and a half passed between the time the inquiry reached the Subcommittee on Criminal Justice and the adoption of Articles of Impeachment by the House of Representatives. Again, litigation made necessary by Judge Hastings' opposition to the Judiciary Committee's efforts to obtain relevant documents delayed the inquiry: Judge Hastings opposed the Committee on the Judiciary's requests for access to the grand jury materials in Judge Hastings' bribery conspiracy case and other documents that were under court-ordered seal in the wiretap matter.[59] Ultimately, the litigation was resolved by the courts in favor of the Committee.[60] The litigation ended on April 18, 1988. One month later, on May 18, 1988, the Subcommittee on Criminal Justice began its hearings. After an exhaus-

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[59] The litigation over the Committee's access to the bribery conspiracy materials delayed its review of those documents for approximately five months, from July to December 1987. Respondent's opposition to the Committee's access to documents in the wiretap matter delayed the Committee's review of those documents for approximately seven months, from September 1987 to April 1988.

[60] The Committee on the Judiciary's requests for access to the materials were granted by Judge John Butzner, a Senior Judge of the Fourth Circuit, sitting by designation as District Judge in the Southern District of Florida. His decisions were affirmed by the Eleventh Circuit Court of Appeals. *See In re Request for Access to Grand Jury Materials*, 669 F. Supp. 1072 (S.D. Fla.), *aff'd*, 833 F.2d 1438 (11th Cir. 1987) (special panel); *In re Grand Jury 86-3 (Miami)*, 673 F. Supp. 1569 (S.D. Fla. 1987), *aff'd*, 841 F.2d 1048 (11th Cir. 1988) (special panel).

tive independent investigation of the facts, including seven days of Subcommittee hearings, the House of Representatives adopted Articles of Impeachment on August 3, 1988.

This chronology demonstrates that the time that elapsed between the commission of the offenses charged in Articles I through XV and Judge Hastings' impeachment is a product of two factors: the litigation occasioned by Judge Hastings' objections to the investigations, and the diligence and care with which the various institutions involved in this matter have handled the inquiry. Each institution efficiently handled its own investigation and reached a decision in a timely manner.

Respondent ignores these facts and argues that there is no compelling justification for the time delay because all the evidence relied upon by the House has been in existence since 1983.[61] He also argues that because Congress did not delegate its impeachment power to the Federal judiciary in the 1980 Act, proceedings conducted pursuant to that Act do not justify the time that has elapsed between the commission of the alleged offenses and his impeachment.[62]

Respondent is wrong on both counts. First, the fact that evidence has been in existence since Judge Hastings' arrest and criminal trial does not require the House of Representatives to impeach him immediately. There is no such constitutional requirement and, as illustrated by the investigation conducted by the Eleventh Circuit, a thorough and unbiased study of the allegations is advisable although time consuming. This is especially true in a case such as this, in which the respondent challenges in court many aspects of the judicial and congressional investigations. The careful

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[61] Respondent's Memorandum at 67–68.

[62] *Id.* at 73–74.

review of this case by various institutions of Government is to ensure that justice is done.

Second, the fact that Congress established in the 1980 Act a procedure through which the Federal Judiciary may conduct an investigation prior to that of the House of Representatives in no way justifies the dismissal of subsequent Articles of Impeachment. The Act establishes a mechanism through which any citizen can initiate a complaint and a respondent's own peers review the allegations. Using such a procedure weeds out frivolous complaints and creates an initial record from which the House may launch its own investigation. The House, of course, may proceed with an impeachment without a Judicial investigation. Respondent, however, is arguing that the House is required to bypass the very mechanism created by Congress to investigate claims against Federal judges. This is an untenable position.[63]

Respondent's assertion of unjustifiable delay is without merit. The same must be said about his claim that he has been prejudiced by delay. He alleges that Articles I through XV should be dismissed because both witnesses and documents have become unavailable, and because recollections have dimmed.[64] What Respondent fails to mention, however, is that nearly all of the witnesses who will testify with respect to Articles I

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[63] Respondent also implies that reliance on the implementation of the 1980 Act is unjustified because he did not participate in the judicial proceedings. Respondent's Memorandum at 70. What Respondent fails to mention, however, is that he was invited to participate fully in the Investigating Committee hearings, but declined to do so. Instead he entered a limited appearance and filed suit in United States District Court challenging the constitutionality of the 1980 Act and its implementation in this case. Respondent could have participated in the judicial proceedings without waiving his right to pursue his legal challenge.

[64] Respondent's Memorandum at 68–70.

through XV have testified under oath in other proceedings.[65] The House will stipulate to the authenticity of this testimony. Three of the unavailable witnesses named by Respondent, Santo Trafficante, Joseph Nesline and Andrew Mavrides, were not called by either party at Respondent's criminal trial, nor does Respondent explain in any detail why their testimony is now so "crucial" to his defense. The other two unavailable witnesses listed by Respondent are Alvoyd Merritt and Frank Romano. Both testified at Judge Hastings' criminal trial and the House will stipulate to the authenticity of their testimony.[66]

C. A DEFENSE OF UNWARRANTED DELAY DOES NOT APPLY TO THE HOUSE OF REPRESENTATIVES

Finally, Respondent's Motion to Dismiss on the basis of laches has no merit because the doctrine does not even apply to the Federal Government.[67] As explained by Justice Stone,

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[65] Witnesses have testified at Judge Hastings' criminal trial, William Borders' trial and the hearings of the Eleventh Circuit Investigating Committee.

[66] Respondent also implies that the primary reason Frank Romano should be a witness is for the Senate to "see him and compare his appearance with that of Rico/Romano." Respondent's Memorandum at 69. Photographs of Frank Romano may substitute, and may more accurately portray his appearance at the relevant time.

[67] *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Guaranty Trust Co. of New York v. United States*, 304 U.S. at 132.

Nor, for that matter, does a statute of limitations defense apply to the Federal Government, unless there is an explicit period established by federal law. *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938); *United States v. City of Palm Beach Gardens*, 635 F.2d 337, 339 (5th Cir. 1981) *cert. denied*, 454 U.S. 1081 (1981).

> 'The true reason [for this rule] . . . is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers . . .' The rule is supportable now because its benefit and advantage extend to every citizen, including the defendant, whose plea of laches or limitation it precludes; and its uniform survival in the United States has been generally accounted for and justified on grounds of policy.[68]

In short, a defense of unreasonable delay does not apply to the United States in a suit to enforce a public right or protect the public interest because the right or interest at stake in the litigation is preeminent.[69]

Here, the House of Representatives seeks to protect a vital public interest—the integrity of the Federal judiciary. The House, as part of the Federal Government, is pursuing a public benefit that cannot be compromised or forfeited by an allegation of delay, particularly where Respondent's own actions have hindered the progress of the investigation. For this reason, the Senate need not even consider the amount of time between the commission of the charged offenses and Judge Hastings' impeachment. In any event, there has been no unwarranted delay in this case requiring the dismissal of Articles I through XV.

IV. Conclusion

For the foregoing reasons, the Senate should reject Respondent's motion and proceed with an impeachment trial on all seventeen Articles of Impeachment presented by the House of Representatives. There is nothing

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[68] *Id. citing* Story, J., in *United States v. Hoar*, 26 Fed. Cas. 329–30, No. 15373.

[69] *See Student Public Interest Research Group of New Jersey v. P.D. Oil and Chemical Storage, Inc.*, 627 F. Supp. 1074, 1085 (D. N.J. 1986).

"unfair" about conducting a trial and removing a judge who tried to sell his office and then managed to obtain an acquittal in a criminal case by repeatedly and knowingly offering false testimony under oath. Respondent's own misconduct on the witness stand resulted in a perversion of the legal process in his criminal trial. He cannot be permitted to profit further from that misconduct in this proceeding.

Accordingly, the Managers respectfully request that the Senate deny Respondent's Motion to Dismiss Articles I through XV.

Respectfully submitted,

THE UNITED STATES
HOUSE OF REPRESENTATIVES,
By ALAN I. BARON,
Special Counsel to the House Managers.

Managers of the House of Representatives: Jack Brooks, John Conyers, Jr., Mike Synar, John Bryant, Hamilton Fish, Jr., George W. Gekas.

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FEBRUARY 24, 1989.

APPENDIX

STATEMENT OF FACTS

The Committee, based on its independent inquiry into the conduct of Judge Hastings, finds the following facts.

A. Bribery Conspiracy

1. Background

On October 22, 1979, Alcee L. Hastings was sworn in as a United States District Judge for the Southern District of Florida. Both William A. Borders, Jr., then a Washington, D.C. attorney, and Hemphill Pride, a mutual friend of Mr. Borders and Judge Hastings, attended Judge Hastings' investiture ceremony. At the time of the swearing in, Mr. Borders and Judge Hastings had known each other for approximately 16 years. They were political allies and social friends. Hemphill Pride was a friend of both men, but he was particularly close to Judge Hastings. Mr. Pride had known Judge Hastings since the early 1960's when they were in law school together in Florida. After graduation, Mr. Pride had returned to South Carolina to practice law.

In 1977, Mr. Pride was convicted in South Carolina of misusing funds in a federally subsidized housing project. As a result of his conviction, Mr. Pride was suspended from the practice of law. His conviction was upheld on appeal in December 1979, not long after Judge Hastings became a federal district judge. During the time Mr. Pride's case was on appeal, Mr. Borders permitted Mr. Pride to live rent-free in an apartment in Washington,

D.C. In March 1980, Mr. Pride began serving his sentence at the federal correctional facility at Maxwell Field in Montgomery, Alabama.

On October 16, 1980, Mr. Pride's mother wrote to Judge Hastings and asked his help in arranging an early release for her son. There is no evidence of a reply from Judge Hastings. Mr. Pride testified that while he was in prison he asked Judge Hastings to raise money for him to hire counsel to pursue certain post-conviction relief. According to Mr. Pride, Judge Hastings refused on the grounds that his position as a judge precluded him from doing so.

Mr. Pride was paroled on March 15, 1981 and he immediately began to work at two jobs in Columbia, South Carolina. He could not be employed as a lawyer, however, because he was indefinitely suspended from the practice of law by the Supreme Court of South Carolina. Under South Carolina rules he could not apply for readmission for two years, until May 1983. He also had to take and pass the South Carolina bar examination.

2. The Romano Case

Thomas and Frank Romano were indicted in November 1978 on 21 counts of racketeering, mail and wire fraud, embezzlement and false tax filings. The indictment alleged violations of the Racketeer Influenced Corrupt Organization statute ["RICO"] which, under certain circumstances, could result in the forfeiture of property connected with illegal racketeering activity. The case was assigned to Judge Hastings within the first week he was on the bench.

In December, 1980 the Romano brothers were tried before a jury. The prosecution charged that they had looted a construction project of over a million dollars through various fraudulent means. During the trial, the prosecution made a proffer to Judge Hastings, out of

the presence of the jury, that the Romanos had a history of making payoffs.

On December 23, 1980, the jury found the Romanos guilty on all counts. The parties agreed to try the forfeiture issues before Judge Hastings without a jury. Under applicable procedural rules, the court was required to make findings of fact and return a special verdict as to the extent of the property to be forfeited. Judge Hastings heard part of the prosecution's proof on the forfeiture issues on December 30, 1980. He then continued the matter until February 20, 1981 for an evidentiary hearing. He announced that he would proceed to final disposition of the case during the week following the evidentiary hearing.

On December 30, 1980, Marshall Curran, Jr., the lawyer who had represented the Romanos at trial, filed an appeal on their behalf. The Romanos retained a new attorney, Neal Sonnett, to handle their sentencing and appeal.

On February 20, 1981, Judge Hastings concluded the evidentiary hearing on the forfeiture matter. The judge reserved ruling and asked the parties to submit memoranda. Judge Hastings stated that sentencing would not be scheduled in light of the fact that there were to be additional submissions by the parties and the court had not yet received the presentence reports.

On March 13, 1981, the prosecution filed its proposed findings of fact and conclusions of law on the forfeiture issue. On April 6, 1981, the Romanos filed their memorandum of fact and law in opposition to forfeiture. On April 7, 1981, the Romanos filed objections to the Government's proposed findings of fact. The next day, April 8, 1981, the Government filed a lengthy memorandum in support of the forfeiture which sought forfeiture of property totalling $1,162,016 in value consisting of four components: (a) the net cash proceeds of certain checks

($305,939); (b) total cash proceeds of certain other checks ($540,000); (c) an investment in the Sea Inn restaurant ($234,061); and (d) a part of the gain realized upon the sale of the restaurant ($82,016).

On April 23, 1981, Judge Hastings' law clerk advised the parties that sentencing in *Romano* would take place on May 11, 1981. The official Notice of Sentencing was filed on April 28, 1981, setting the sentencing for May 11 at 1:00 p.m.

On May 4, 1981, Judge Hastings entered an order forfeiting property owned by the Romanos worth $1,162,016.

3. William Dredge and Further Events in Romano

William Dredge operated an antique store in north Miami, Florida. He was also a fence, a burglar, and a drug dealer. Mr. Dredge was a friend of Joseph Nesline, a Washington, D.C. gambler, who apparently introduced Mr. Dredge to Mr. Borders in late March or early April of 1981. In March 1981, Mr. Dredge was the subject of a narcotics investigation in Maryland. He was in touch with Mr. Borders in connection with this problem.

Mr. Dredge testified before the Eleventh Circuit Investigating Committee that around the end of March or in early April 1981, Mr. Borders asked Mr. Dredge if he knew the Romano brothers since Mr. Dredge was from the south Florida area. When Mr. Dredge responded that he did not know them, Mr. Borders asked him to check them out. Mr. Dredge made some inquiries and reported to Mr. Borders that the Romanos were "good stand up people," which in underworld parlance meant they would live up to their commitments and not disclose matters to the authorities. Mr. Borders then asked Mr. Dredge to contact the Romanos and tell them Mr. Borders might be able to help them in their criminal case. Mr. Dredge passed word to the Romanos that he

knew an attorney in Washington, D.C. who could help them with their case.

Hotel and telephone records establish that the Romanos were in California on April 7, 1981 and during their stay they learned through an intermediary of Mr. Dredge's message about a Washington lawyer who could help them. In response, the Romanos contacted their counsel, Neal Sonnett, who documented the call in a memorandum dated April 16, 1981. The Romanos decided to ignore Mr. Dredge's offer.

Mr. Dredge reported to Mr. Borders about his attempted contact with the Romanos. Mr. Dredge testified before the Eleventh Circuit Investigating Committee that Mr. Borders said the judge handling the Romanos' case was a good friend of his and, for $150,000, he could deliver the judge. Mr. Dredge testified he did not really believe Mr. Borders could control a federal judge.

Over the next few months Mr. Borders repeatedly asked Mr. Dredge about the situation and Mr. Dredge reported that he had talked to the Romanos, but they did not have any money. According to Mr. Dredge, he was simply stringing Mr. Borders along. Mr. Dredge never had any contact with the Romanos or their intermediary after meeting with the intermediary in early April. Mr. Borders continued to importune Mr. Dredge about the Romanos and Mr. Dredge kept telling Mr. Borders that the Romanos did not have the money. According to Mr. Dredge, Mr. Borders said the judge could not believe the Romanos could not come up with money to keep them out of jail.

Mr. Dredge testified that when he suggested to Mr. Borders that the Romanos were trying to get to Judge Hastings through another contact, Mr. Borders challenged anyone else to produce the judge at a given time and place. Mr. Borders said he would produce Judge

Hastings at a given time and place to prove he controlled him.

On April 29, 1981, a sealed indictment was returned in Baltimore, Maryland charging William Dredge with narcotics offenses. Mr. Dredge was arrested in Florida on May 10, 1981, and Mr. Borders arranged for Jesse McCrary, a Miami lawyer, to represent Mr. Dredge at his bail hearing on May 11, 1981. Also on May 11, 1981, the Romanos were scheduled to be sentenced by Judge Hastings.

Mr. Dredge testified before the Investigating Committee that he had a conversation with William Borders the day before the Romanos were supposed to be sentenced, in which Mr. Borders told him the sentencing would be continued by Judge Hastings in order to give the Romanos a chance to come up with the money, because the judge could not believe they would not do so.

At the May 11, 1981 sentencing hearing, the Romanos' attorney, Neal Sonnett, requested a continuance in order to present additional argument to the court regarding a pending motion for new trial that was scheduled to be heard that day. The Government opposed the continuance on the ground that everything had been thoroughly briefed and there had already been a delay of five months since the conviction. Judge Hastings granted the continuance and asked for briefs on RICO issues. He then set a briefing schedule and indicated that sentencing would not take place until late June 1981, but that the next time it was scheduled, sentencing would proceed.

Mr. Dredge testified before the Investigating Committee that Mr. Borders called him the day after the sentencing had been postponed to say that the hearing had been continued and the Romanos had better come up with the money. Mr. Dredge was convinced William Borders was serious about the bribe after the continu-

ance of the hearing. It was Mr. Dredge's understanding, based on what Mr. Borders told him, that Judge Hastings had postponed the sentencing on his own motion. In fact, the May 11, 1981 sentencing was postponed on the basis of Mr. Sonnett's eleventh hour request. The fact that Mr. Borders knew in advance that the sentencing hearing would be continued, however, convinced Mr. Dredge that the bribery scheme was for real.

On Friday, June 19, 1981, a panel of the Fifth Circuit handed down a decision in *United States v. Martino*.[1] At issue in the case was an interpretation of the RICO statute's forfeiture provisions pertaining to the definition of an interest that was subject to forfeiture. The court held that the term "interest" did not include income, receipts or profits from racketeering activity. Government attorneys and defense counsel in *Romano* recognized that this opinion had important implications for the order previously entered by Judge Hastings on May 4, 1981, forfeiting property owned by the Romanos worth $1,160,000.[2] Accordingly, all parties briefed the issue in papers filed with the Court in advance of a hearing scheduled for July 8, 1981.

At the July 8, 1981 hearing, Judge Hastings was scheduled to sentence the Romanos and hear argument on all outstanding motions, including a motion for him to reconsider his May 4, 1981 order requiring forfeiture. At the hearing, after extensive argument concerning the impact of *Martino*, Judge Hastings stated to counsel he was familiar with *Martino* and had read the briefs. He had also received a memorandum on the issue from his law clerk shortly before going on the bench to conduct the hearing. At the conclusion of the argument,

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[1] 648 F.2d 367 (5th Cir. 1981).

[2] This figure appeared in the Committee Report; however, it was in error. The correct figure is $1,162,016.

Judge Hastings reaffirmed his forfeiture order of May 4, 1981. He stated that he would file a brief written order explaining the basis for his decision.

Judge Hastings then sentenced each of the Romanos to a prison term of three years. The prison terms were consistent with the recommendation of the probation office.

4. The Undercover Investigation

On June 3, 1981, the case of *United States v. Accardo* was brought in the Southern District of Florida. This was a multi-defendant racketeering case in which Santo Trafficante, reputed to be the organized crime boss of southern Florida, was named as a defendant. The case was assigned to Judge Hastings. A month later, William Dredge flew to Washington, D.C. and stayed with Joseph Nesline from July 7–9, 1981. Mr. Dredge told the Investigating Committee that during his stay, Mr. Nesline had another guest at the apartment—Santo Trafficante. While at the apartment, Mr. Dredge observed Mr. Trafficante trying to contact Mr. Borders and heard bits and pieces of conversation which led him to believe that Mr. Borders and Judge Hastings were involved in a bribery scheme to obtain money from Mr. Trafficante.

On July 20, 1981, Mr. Dredge advised the United States Attorney's Office in Miami that he had information concerning a bribery scheme involving Judge Hastings, Santo Trafficante and a Washington, D.C. lawyer who was coming to Miami the next day to meet with Mr. Trafficante. In return for this information, Mr. Dredge wanted the drug charges pending against him in Maryland dismissed. In the course of ensuing discussions with Government prosecutors, Mr. Dredge also revealed the proposal to solicit a bribe from the Romanos—the essence of which was that for $150,000 their sentences would be reduced to probation.

Mr. Dredge did not initially identify Mr. Borders as the Washington lawyer who was arriving the next day to meet with Mr. Trafficante. However, a strike force attorney who had worked in Washington recognized Mr. Borders' name on a passenger list and visually identified Mr. Borders at the airport. The FBI followed Mr. Borders, who took a cab to Mr. Dredge's house and was later driven by Mr. Dredge to a shopping center. From there Mr. Borders took a cab to the Fontainebleau Hotel, where the FBI observed him meeting with Santo Trafficante for 5 to 10 minutes in a secluded area. Thereafter, Mr. Trafficante drove Mr. Borders to the airport.

Mr. Dredge continued to be debriefed by the Government concerning his knowledge of any bribery schemes. On August 18, 1981, Mr. Dredge told law enforcement agents that Mr. Borders was coming to Miami again to meet with Mr. Trafficante to iron out their bribery deal. FBI surveillance teams observed that on August 21, 1981, Mr. Borders flew to Miami, took a taxi to the Fontainebleau Hotel, got out of the cab, and got into a car driven by Mr. Trafficante, who thereupon drove him back to the airport. They spoke for four minutes at the terminal and Mr. Trafficante left.

Having twice corroborated Mr. Dredge's statements, the Government attempted to enlist Mr. Dredge's cooperation. Mr. Dredge refused to testify or wear a recording device because he feared for his life. He was willing, however, to introduce an undercover agent to Mr. Borders as one of the Romano brothers. Mr. Dredge advised the FBI that Mr. Borders was anxious to do the Romano deal, but that he would only deal with one or both of the Romanos.

On August 27, 1981, the Fifth Circuit handed down the case of *United States v. Peacock*, [3] which grudgingly followed the *Martino* rationale, while noting that a petition for rehearing en banc was pending in *Martino*. Jeffrey Miller, one of Judge Hastings' law clerks, testified that he brought this case to Judge Hastings' attention in early September, in all likelihood before September 10, 1981. According to Mr. Miller, Judge Hastings then told him to "give the money back" to the Romanos.

On September 10, 1981, Mr. Dredge, in the presence of an FBI agent, telephoned Mr. Borders and advised him that the Romanos were "ready to deal." Arrangements were made for Mr. Dredge to meet Mr. Borders at the Miami airport on Saturday, September 12 at 8:00 a.m. and introduce him to "Frank Romano," who was to be impersonated by retired FBI agent, H. Paul Rico.

On Friday, September 11, 1981, Judge Hastings was scheduled to fly from Miami to Washington, D.C. Judge Hastings was scheduled to leave Miami at 3:48 p.m., but his flight was delayed. He called Mr. Borders' office twice to advise him of the delay. He did not arrive at Washington National Airport ["National"] until about 8:00 p.m., two hours after his original scheduled arrival time.

On the same day, Mr. Borders was scheduled to leave National for Miami at 7:30 p.m. in order to make his meeting at 8:00 a.m. the next morning with Mr. Dredge and "Frank Romano." However, he changed his flight to leave at 9:25 p.m., thereby arriving in Miami at 1:30 a.m. on September 12. This schedule change created a clear opportunity—a period of over an hour—when Judge Hastings and Mr. Borders could have met at National, although no one actually observed such a meeting. Judge Hastings did not check into the Sheraton

[3] 654 F.2d 339 (5th Cir. 1981).

Hotel until 10:14 p.m., over two hours after he arrived in Washington, D.C.

The next morning, September 12, 1981, Mr. Borders met Mr. Dredge and the man who he thought was Frank Romano at the Miami airport. The undercover agent, Mr. Rico, was wearing a body recorder and recorded the conversation with Mr. Borders. At the meeting, Mr. Borders stated that he understood that the Romanos had "lost some property." He advised Mr. Rico that 10 days after receiving a payment of $150,000, an order would be signed returning a "substantial amount" of the property and thereafter, they were to withdraw their appeal and something would be done about their jail sentences. When Mr. Rico raised the issue of "how do I know," Mr. Borders responded, "checks and balances." Mr. Borders said, "I don't get nothin', until the first part is done. . . that will be a signal showing you that I'm, I know what I'm talking about, right?"

Mr. Borders proposed that the money be placed in escrow with Mr. Dredge and that Mr. Borders would only receive the money after the order came down. Mr. Rico said he preferred not to use Mr. Dredge and, aware that previously Mr. Borders had suggested to Mr. Dredge that Mr. Borders could prove his influence with Judge Hastings by having him show up at a given time and place, Mr. Rico proposed verification in that manner. Mr. Rico asked if Mr. Borders wanted to get back to him with the time and place. Mr. Borders said that was unnecessary and immediately selected Wednesday, September 16, 1981, as the date for Judge Hastings' appearance. Mr. Rico selected the main dining room in the Fontainebleau Hotel in Miami Beach at 8:00 p.m.

Mr. Borders and Mr. Rico agreed to meet the following Saturday, September 19, 1981, at the Miami airport at which time Mr. Rico would make an "up front" pay-

ment on the bribery deal. At the conclusion of their meeting Mr. Borders assured Mr. Rico, saying "that's 100 percent, 100 percent, 100 percent."

At the time of his conversation with Mr. Rico about the status of the *Romano* case, Mr. Borders had no official connection with the case. He was a Washington, D.C. lawyer, and was not a member of the Florida bar. According to Judge Hastings' trial testimony, he never spoke to Mr. Borders about the facts, proceedings, or issues in the case.

When Mr. Borders finished his meeting with the undercover agent, he flew from Miami to West Palm Beach and drove to a long-planned family reunion. He stayed there only briefly, however, and made a complex series of reservations and cancellations of airplane flights back to Washington, D.C. Ultimately, Mr. Borders flew from Orlando, Florida to Baltimore-Washington International Airport ["BWI"], arriving at 8:58 p.m.[4]

Judge Hastings was spending that weekend of September 11-13, 1981, in Washington, D.C. at the Sheraton Hotel. Jesse McCrary, a mutual friend of Judge Hastings and Mr. Borders, registered at the Sheraton Hotel on the 12th in the room next to Judge Hastings.

Around 9:00 p.m. on Saturday, September 12, 1981, Mr. Borders landed at BWI. From there he immediately went to the Sheraton Hotel in Washington, arriving at Judge Hastings' room at 10:00 p.m. When Mr. Borders arrived, Judge Hastings, Jesse McCrary and three women—two sisters, Pearl and Margaret Dabreau, and Donna Myrill—were in the judge's room. The group had not yet had dinner. According to Mr. McCrary, it was

[4] The day before setting up his initial meeting with Mr. Rico, Mr. Borders told both Judge Hastings and their friend Jesse McCrary that he intended to be in Florida for the weekend.

Judge Hastings' idea to delay dinner. Ms. Pearl Dabreau testified before the Investigating Committee that the group was "waiting for someone." Ms. Myrill testified before the Investigating Committee that they were specifically waiting for Mr. Borders. After Mr. Borders arrived, they all went to dinner. At trial, Judge Hastings testified under oath that Mr. Borders' appearance at the Sheraton Hotel that night was a surprise and not prearranged.

There is no evidence in the record to explain how Mr. Borders knew Judge Hastings would be in his room at the Sheraton Hotel at 10:00 p.m. on a Saturday night, although Mr. Borders clearly went to great lengths to get there from Florida, including foregoing his family reunion.

On Tuesday, September 15, 1981, Mr. Borders and a friend, Madeline Petty, flew from Washington, D.C. to Las Vegas, Nevada to attend the Sugar Ray Leonard-Tommy Hearns championship fight scheduled for Wednesday, September 16. This trip had been planned as a birthday present for Ms. Petty; the plane tickets had been purchased two weeks earlier on September 1, 1981. According to Dudley Williams, a close friend and former law partner of Mr. Borders, Mr. Borders' friends knew that he never missed an important championship fight.

September 16, 1981 was also the date Mr. Borders and Mr. Rico had agreed that Judge Hastings would appear at the main dining room of the Fontainebleau Hotel at 8:00 p.m. in order to prove that the judge was in on the bribery scheme. FBI agents had the hotel under surveillance. Shortly before 8:00 p.m., Judge Hastings and a woman named Essie Thompson were observed entering the Fontainebleau Hotel and walking into the dining room.

Judge Hastings had invited Ms. Thompson to dinner the day before. He did not mention Mr. Borders to her nor did he indicate that they were meeting anyone. The maitre d' seated them at a table for four and removed two place settings. Judge Hastings did not protest. After about 15 minutes, Judge Hastings left the table and returned a few minutes later. At Judge Hastings' trial in January 1983, Ms. Thompson testified that when Judge Hastings returned to the table he said he was "looking for some friends from D.C." According to the FBI interview report dated October 10, 1981, however, Ms. Thompson told FBI agents that when Judge Hastings returned to the table he said he was "looking for someone, but did not see them." Judge Hastings acknowledged at trial that he did not have Mr. Borders paged. At trial, he testified that Mr. Borders had promised to meet him at the Fontainebleau that night but had not shown up.

Mr. Borders was in Las Vegas at the championship fight. He and Ms. Petty returned to Washington, D.C. two days later, on Friday, September 18, 1981, between 8:00 and 9:00 p.m. At the airport, Mr. Borders and Ms. Petty parted company. Mr. Borders took a 9:20 p.m. flight to Miami, in order to make his arranged meeting with Mr. Rico the next morning for the "up front" payment.

Mr. Rico had not told Mr. Borders that Judge Hastings had appeared at the Fontainebleau Hotel on September 16, as promised. Mr. Borders nevertheless proceeded directly from National to Miami for his rendezvous with Mr. Rico as if he knew that the signal confirming Judge Hastings' involvement had been given.

On Saturday morning, September 19, 1981, at 10:00 a.m., Mr. Borders and Mr. Rico again met at the Miami airport. Mr. Rico was wearing a body recorder. After an exchange about the Leonard-Hearns fight, the under-

cover agent said: "You did what you said you'd do." Mr. Borders acknowledged this and Mr. Rico continued. "Your man arrived and in fact, he arrived a little early and, ah, you said you could do that, and that's ah, your end of the situation." Mr. Borders then asked, "What is it in?" and Mr. Rico replied that it was just in an envelope. Mr. Rico said he would put it inside a newspaper and give it to Mr. Borders. The undercover agent then said "[B]efore we go any further, the last time we talked my understanding was that, ah, some property was going to be released." Mr. Borders said the property would be released within 10 days. He told Mr. Rico, "Once you do that then file a motion for mitigation of sentence." Mr. Borders said, "Just tell him [the attorney] you're tired of the appeal, just see if the man will reduce the sentence."

The two men then separated and Mr. Rico went to get $25,000 in cash which had been placed in a locker. The undercover agent returned and placed the newspaper containing the envelope with the money on the arm of a sofa. Mr. Borders picked up the newspaper. There was further conversation, and Mr. Borders told Mr. Rico that the money would cover a reduction in sentence for both Romanos. They then discussed when the balance of the bribe would be paid. Mr. Borders suggested it be paid as soon as the order was entered returning the forfeited money. Mr. Rico proposed another installment payment, then full payment "on the culmination," i.e., when the sentences were reduced. Mr. Borders objected that this was not the deal. He again proposed that the money be put in escrow with Mr. Dredge. Mr. Rico rejected that idea. They finally agreed that on October 3, 1981 after Judge Hastings issued the order, the remaining $125,000 would be paid.

There was no further contact between Mr. Borders and the undercover agent between September 19 and

October 2, 1981. The order returning a portion of the forfeited property was not issued within 10 days of September 19 as Mr. Borders had promised.

On October 1, 1981, a lawfully authorized wiretap was placed on Mr. Borders' business phone, and on October 2, 1981, a similar tap was placed on his residential phone. Mr. Rico placed four calls on Friday, October 2, to Mr. Borders' office. Mr. Borders was out, but he arranged to have a call patched through to him. At 3:11 p.m. Mr. Rico spoke to Mr. Borders and told him nothing had happened regarding the order. Mr. Borders replied "I think it has . . . I'll check into it," and then suggested they cancel the scheduled October 3, 1981 meeting for the final payment. Mr. Borders said he was not sure he would be able to call Mr. Rico back Friday night; he explained he did not know if he could find out "because of the time." They agreed that Mr. Rico would call Mr. Borders at home two days later, Sunday, October 4, 1981.

By 4:50 that Friday afternoon, Mr. Borders was back in his office. In a call recorded by the FBI, Mr. Borders' secretary called Judge Hastings' chambers and was told that Judge Hastings had left for the day.

On Sunday morning, October 4, Mr. Rico called Mr. Borders as agreed to find out the status of the order. Mr. Borders explained "I have not, ah, gotten an answer, cause I haven't been able to talk to anybody." Judge Hastings testified at trial that William Borders called him the afternoon of October 4 and left a message for him to return the call.

On Monday morning, October 5, 1981, Judge Hastings told his law clerk, Jeffrey Miller, to do the order returning a substantial amount of the Romanos' property that day. This was an "unusual" request according to Mr. Miller, although he also observed it was unusual for an order to sit around that length of time. Another law

clerk, Daniel Simons, stated that Judge Hastings seemed disturbed that Mr. Miller had not finished the order.

At 4:22 p.m. on October 5, 1981, Mr. Rico again called William Borders. He said he was anxious. Mr. Borders said he understood, that he had checked on the matter, that the order had not gone out yet, but "that's been taken care of." Mr. Borders said it probably went out that day, the 5th, or would go out first thing in the morning, on the 6th.

Less than one hour later, at 5:12 p.m., Judge Hastings called Mr. Borders and the following conversation occurred:

> Mr. BORDERS: Yes, my brother.
> Judge HASTINGS: Yeh, my man.
> Mr. BORDERS: Um hum.
> Judge HASTINGS: I've drafted all those, ah, ah, letters, ah, for Hemp . . .
> Mr. BORDERS: Um hum.
> Judge HASTINGS: . . . and everything's okay. The only thing I was concerned with was, did you hear if, ah, you hear from him after we talked?
> Mr. BORDERS: Yea.
> Judge HASTINGS: Oh. Okay.
> Mr. BORDERS: Uh huh.
> Judge HASTINGS: Alright, then.
> Mr. BORDERS: See, I had, I talked to him and he, he wrote some things down for me.
> Judge HASTINGS: I understand.
> Mr. BORDERS: And then I was supposed to go back and get some more things.
> Judge HASTINGS: Alright. I understand. Well then, there's no great big problem at all. I'll, I'll see to it that, ah, I communicate with him. I'll send the stuff off to Columbia in the morning.
> Mr. BORDERS: Okay.
> Judge HASTINGS: Okay.
> Mr. BORDERS: Right.
> Judge HASTINGS: Bye bye.
> Mr. BORDERS: Bye.

The Government argued at Judge Hastings' trial that this was a coded conversation intended to convey information concerning the bribery scheme. Judge Hastings testified at trial that it was not a coded conversation, but rather a discussion about some letters he was drafting to help Hemphill Pride. The Subcommittee submitted the tape recording and the transcript of this conversation to a recognized expert in the field of linguistics, Professor Roger Shuy of Georgetown University, who analyzed the conversation and concluded that Judge Hastings and Mr. Borders were engaging in a coded conversation.

On October 6, Judge Hastings issued an order which vacated judgments against the Romanos for over $845,000 of the total original forfeiture of $1,200,000.[5] This order reversed in large measure Judge Hastings' prior order of May 4, 1981 and was inconsistent with his oral ruling on July 8, 1981. There had been no further filings or proceedings before Judge Hastings since the hearing on July 8, 1981.

Mr. Rico called Mr. Borders at mid-day on October 7 inquiring again about the status of the order. This time Mr. Borders said "it went out yesterday morning." This assertion corresponds to Mr. Borders' October 5 conversation with Judge Hastings in which the judge said he would send out "the letters in the morning." In fact, the order had gone out by special delivery the evening of October 6. Mr. Rico called Mr. Borders the night of the 7th to tell him he had received word that the order had been issued. They discussed arrangements for the final payoff. Mr. Rico offered to travel to Washington, D.C. on Thursday or Friday, October 8 or 9. Mr. Borders

[5] This figure appeared in the Committee Report; however, it was in error. The correct figure is $1,162,016.

agreed and told Mr. Rico to call him when he got to town.

The National Bar Association had scheduled a testimonial dinner in honor of Mr. Borders, a past president of the organization, for October 9, 1981, in Washington, D.C. Judge Hastings was one of the sponsors of the dinner. On the morning of October 8, 1981, Mr. Borders received a call from Judge Hastings who stated that he would be arriving in Washington the next day at 10:40 a.m. Judge Hastings told Mr. Borders he was staying at the Washington Hilton, although he would prefer to be at the L'Enfant Plaza Hotel. Mr. Borders said he could always get Judge Hastings in there.

Mr. Borders picked up Judge Hastings at National on the morning of October 9. They drove from the airport to the L'Enfant Plaza where a suite and an adjoining room were assigned to them. They stopped briefly to see Hemphill Pride, who was also staying at the L'Enfant Plaza Hotel for the National Bar Association event. Judge Hastings and Mr. Borders then left the hotel and after a couple of intermediate stops arrived at Mr. Borders' office where Mr. Borders had a message to call "Frank" [Mr. Rico] at the Twin Bridges Marriott Hotel. Mr. Borders called and Mr. Rico told Mr. Borders he had "brought all the necessary papers." Mr. Rico and Mr. Borders agreed to meet at the Marriott in about an hour.

When Mr. Borders arrived at the Marriott, he told Mr. Rico, who was wearing a recording device, to "get it" because he wanted to take a ride. Mr. Borders and the undercover agent got into Mr. Borders' car, with a bag containing $125,000 in 100 dollar bills on the floor

94-532 O - 89 - 7

between them. As they started to leave the parking lot, the FBI pulled them over and arrested Mr. Borders.[6]

Mr. Borders was arrested just before 1:00 p.m. on October 9, 1981. At 1:18 p.m. Mr. Borders requested and received permission to telephone his attorney, John Shorter. Mr. Shorter arrived at the Marriott at 1:31 p.m. according to FBI logs. At 1:55 p.m., Special Agents Bird, Skiles and Murphy left for Mr. Borders' law office to locate and interview Judge Hastings. They entered the office at 2:40 p.m. and presented subpoenas for certain of Mr. Borders' records to Mr. Borders' secretary, who was uncertain how to deal with the situation. She contacted Mr. Shorter and Agent Murphy explained to Mr. Shorter that they had subpoenas for records. Mr. Shorter told the secretary to accept the subpoenas.

In addition, Agent Murphy told Mr. Shorter that they were trying to locate Judge Hastings in order to interview him, and asked Mr. Shorter to give the judge Mr. Murphy's name, Mr. Bird's name and the number of the FBI Washington field office if he located the judge.

After leaving Mr. Borders' office and making a few stops, Judge Hastings returned to his room at the L'Enfant Plaza Hotel and ordered lunch from room service around 1:00 p.m. Shortly thereafter, Mr. Pride dropped by and joined him for lunch. Afterwards, they went downstairs for drinks in the hotel's cocktail lounge.

When Mr. Pride returned to his room, he immediately received a phone call from John Shorter who told him that Mr. Borders had been arrested on charges involving bribery that had taken place in Judge Hastings'

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[6] The FBI's decision to arrest Mr. Borders immediately rather than let the money go was based in part on a belief that the money would not go directly to Judge Hastings, but instead would first be "laundered." The $25,000 that was paid to Mr. Borders on September 12, 1981 was never found. The Government eventually recovered $25,000 from Mr. Borders in a civil suit.

court. Mr. Shorter also told Mr. Pride that the FBI was looking for Judge Hastings to interview him. Mr. Shorter gave Mr. Pride the names of two FBI agents and the FBI telephone number. He asked Mr. Pride to give the message to Judge Hastings and to tell him to contact the agents. Mr. Shorter thought that Judge Hastings should have a lawyer present and suggested the name of a Washington attorney. Mr. Pride immediately called Judge Hastings and told him he had an important message and that he should come to Mr. Pride's room.

Mr. Pride took his two-year old son and met Judge Hastings outside the elevator on Mr. Pride's floor of the hotel. Mr. Pride related Mr. Shorter's information. Mr. Pride testified at Mr. Borders' trial that Judge Hastings' reaction was one of shock, as if "he didn't know which way to move or what to do." Judge Hastings repeatedly asked where Mr. Borders was. Mr. Pride told the judge he knew nothing more than what he had learned from the phone call. The judge asked Mr. Shorter's number, but Mr. Pride stated that Mr. Shorter was with Mr. Borders.

Mr. Pride testified that he and Judge Hastings then left Mr. Pride's child at Mr. Pride's room and went together to Judge Hastings' room. Mr. Pride testified at Judge Hastings' criminal trial that he suggested to Judge Hastings that if he had a problem he could best handle this matter in Florida, rather than in Washington and that he should get Florida counsel. Mr. Pride watched while Judge Hastings packed his clothes. When Mr. Pride offered to give Judge Hastings a ride to the airport, Judge Hastings declined, saying that Mr. Pride should not get involved because Mr. Pride was still on parole and that he would take a cab. They then went downstairs to the lobby where Judge Hastings and Mr. Pride parted. Mr. Pride testified that Judge Hastings made no phone calls in his presence.

At his trial, Judge Hastings testified that before leaving the L'Enfant Plaza Hotel, he gave Mr. Pride a 100 dollar bill and asked him to pay the room service charge and to pick up a suit Judge Hastings had left with the valet service. Mr. Pride, in his testimony, denied that Judge Hastings gave him any money or asked him to take care of the charges or the suit. The room service charge was not paid and the suit was left behind.

Judge Hastings also testified at trial that after speaking with Mr. Pride outside the elevators, he returned alone to his room and telephoned his mother and his fiancee, Patricia Williams, in Florida, while Mr. Pride went to his own room. According to Judge Hastings, when he called his mother long distance from his hotel room, she said she had learned about William Borders' arrest and that reporters were at her apartment complex. She allegedly was hysterical and told him to "come home." Judge Hastings also testified that he called Ms. Williams who told him that she had been interviewed by the FBI and that she had called his chambers and learned the FBI was interviewing his staff. According to Judge Hastings, Mr. Pride joined him after these calls.

The computer-generated record of all calls charged to rooms at the L'Enfant Plaza hotel on October 9, 1981 does not reflect the calls Judge Hastings claims he made to his mother and Ms. Williams. The Chesapeake and Potomac Telephone Company routinely maintains a computer record of all telephone calls from the guest rooms at the L'Enfant Plaza Hotel. The computer runs for October 9 and 10, 1981, reflect only one call made from the hotel to area code 305—the area code for south Florida. That call was made at "22:00" (10:00 p.m.), long after Judge Hastings had left for Florida. Moreover, that call was placed from a room other than the one as-

signed to Judge Hastings. The records show no long distance calls made from Judge Hastings' room until the morning of October 10, 1981 at 1:56 a.m., again long after the judge had departed the hotel and the District of Columbia. That call was made to New York City.

On the afternoon of October 9, 1981, the FBI office in Washington, D.C. advised FBI personnel in Miami to begin interviews at Judge Hastings' chambers. The agents arrived at about 2:50 p.m. and were there until approximately 5:15 p.m. The Miami office of the FBI also received instructions to interview Ms. Williams, Judge Hastings' fiancee. FBI agents arrived at her office at about 2:50 p.m. and began the interview at approximately 3:00 p.m. Ms. Williams was interviewed by FBI agents for approximately 45 minutes. She was interrupted once by a phone call during the interview and stated to the agents upon her return that the call was from a client. On Friday, October 9, 1981, at 2:50 p.m., FBI agents left Mr. Borders' office to go to the L'Enfant Plaza Hotel. They arrived at about 3:10 p.m., and were advised by the front desk that Judge Hastings had not checked out. Special Agent Murphy then called Judge Hastings' room and there was no answer. The agent called several times over the next few minutes and then went to the room and knocked. Each time there was no answer. At 3:30 p.m., Special Agent Murphy again called Judge Hastings' room. There was no answer.

The evidence indicates that Judge Hastings departed for the airport within 30 to 40 minutes of the time he first learned of Mr. Borders' arrest. By around 3:00 p.m., he was aware the FBI in Washington, D.C. wanted to interview him. Judge Hastings testified that he left the hotel at approximately 3:35 or 3:40 p.m. By 4:37 p.m., according to telephone records, he was at BWI calling his mother from a pay phone.

Airline records establish that Judge Hastings could have taken a direct flight that afternoon from Washington, D.C. to Miami, where his car was parked. There were 14 seats available on a flight, which left National at 4:35 p.m. However, instead of traveling to National which is located four miles from the L'Enfant Plaza Hotel, Judge Hastings went by taxi—at a cost of $50—to BWI, which is 32 miles northeast of the hotel and approximately an hour away in Friday afternoon traffic.

At 4:37 p.m., Judge Hastings called his mother from a pay phone at BWI and spoke for four minutes, charging the call to his home telephone. This is the first documented contact between the judge and his mother that day. At 5:06 p.m., he called Ms. Williams from a BWI pay phone, also charging the call to his home telephone. This is the first documented call from Judge Hastings to Ms. Williams that day. He spoke to her for one minute and told her to call him back at a different pay phone. She called back at 5:07 from her home, and again at 5:22 p.m. from a pay phone. He then took her number, moved to a third pay phone and called her again. Judge Hastings admitted at his trial that he had engaged in this series of pay phone calls. He testified to several explanations for this conduct—a baby was crying; he suspected government surveillance near the pay phone; he was afraid Ms. Williams' phone had been tapped. He denied, however, that he went to BWI because he was trying to avoid any FBI agents who might be waiting for him at National.

Delta Airline records show that at 5:31 p.m. Judge Hastings made a reservation on flight 237 departing BWI at 6:30 p.m. for Miami with an intermediate stop in Fort Lauderdale. There is a handwritten notation on Judge Hastings' ticket crossing out Fort Lauderdale as his destination and substituting Miami. However, Judge Hastings got off the plane when it stopped in Fort Lau-

derdale. At the Fort Lauderdale airport, Judge Hastings rented a car because he had parked his car at the Miami airport when he had left Florida.

Judge Hastings testified at trial that upon arrival in Fort Lauderdale, he went to his mother's house and then proceeded to the home of Ms. Williams. In his FBI interview on October 9, 1981, however, he stated that he called his mother from the airport and drove directly to the home of Ms. Williams, without first seeing his mother. Judge Hastings testified that he arrived at Ms. Williams' home between 9:30 and 10:00 p.m. and told her to expect a visit from FBI agents. At about midnight, two FBI agents showed up and interviewed Judge Hastings for two hours. They testified that they had gone to Ms. Williams' home on the chance that Judge Hastings might be there.

FBI Agent John Simmons testified that when Mrs. Hastings was interviewed by the FBI on the night of October 9, at about 11:00 or 11:30 p.m., she stated that she had not heard from her son. Judge Hastings testified at trial that he had gone home and that if his mother had told the FBI that she had not heard from him, it was because she had had too much to drink. Both Judge Hastings and his mother denied that she had been instructed to tell the FBI that she had not heard from him. Mrs. Hastings testified at trial that Judge Hastings came to the apartment and she gave the FBI Ms. Williams' telephone number when an agent called later that night.

When Judge Hastings was interviewed by the FBI at Ms. Williams' home, he denied any involvement with Mr. Borders in a bribery conspiracy. He stated that he did not believe he had ever discussed the *Romano* case with Mr. Borders. With respect to his abrupt departure from Washington, D.C., Judge Hastings said he went home because he believed he could better defend him-

self against allegations while on "his own turf." He later testified at trial that he departed immediately because of the telephone calls he made from the hotel to his mother and Ms. Williams. When interviewed by the FBI on October 9, 1981, Judge Hastings did not mention any telephone calls.

On Monday, October 12, 1981, three days after Mr. Borders' arrest, at 6:38 a.m., a person placed a telephone call from Judge Hastings' home telephone number (305-731-8176) to William Borders' home telephone number (202-398-6321). The call lasted two minutes. No recording of the conversation was made because the wiretap was no longer in effect.

On October 14, 1981, Ms. Williams wrote to Judge Hastings and told him that she felt "pride and joy as well as horror" as a result of their telephone conversation on Friday, October 9th, when Judge Hastings called her "from Baltimore" and indicated that he wanted her legal assistance in confronting allegations of bribery which Judge Hastings had just learned were being directed against him.

5. Contacts Between Judge Hastings and William Borders

As the *Romano* case proceeded, there was a series of telephone calls between Judge Hastings and Mr. Borders, which are documented through toll records. Judge Hastings also testified to two additional calls from Mr. Borders. While the content of these calls is not always known, there is a synchronization of contacts between Mr. Borders and Judge Hastings relative to significant documented events in the *Romano* case. As the Eleventh Circuit Investigating Committee observed, the telephone contacts between Judge Hastings and Mr. Borders were often of brief duration, sometimes at odd

hours and on at least one occasion from and to a pay phone.

Analysis of these contacts reveals that most of the known calls occurred on or close to days on which (a) Judge Hastings had motions in the *Romano* case under active consideration, (b) Judge Hastings held hearings relating to the Romanos' forfeiture or sentencing matters, or (c) William Borders was negotiating about the payment of a bribe. The available telephone records for Judge Hastings and Mr. Borders, and Mr. Borders' office message logs reflect only eight other telephone contacts from January through October 1981. Specifically:

1. On February 20, 1981, the day of the forfeiture hearing, Judge Hastings called Mr. Borders early in the morning. The call lasted three minutes.

2. On April 9, 1981, the day after the last memoranda relating to the forfeiture issue were filed, Judge Hastings called Mr. Borders' office. He left a message for Mr. Borders to call and said he would be "at his office between 12 and 1." At 12:15 p.m. a call was placed from a pay phone in the corridor of the third floor of the federal courthouse in Miami, Florida near Judge Hastings' chambers to a pay phone in the lobby of the federal courthouse in Washington, D.C. The call lasted one minute or less and was charged to Judge Hastings' residence. At about the same time, Mr. Borders' secretary made a reservation for Mr. Borders to fly to Miami the following weekend. This call was made within a day or two of when the intermediary relayed Mr. Dredge's message to the Romanos that there was a Washington, D.C. lawyer who might be able to help them with their case.

3. Judge Hastings called William Borders three times within a few days of April 23, 1981, the date

the parties were advised the Romanos sentencing was scheduled for May 11, 1981.

4. On May 4, 1981, the day Judge Hastings entered his ordered compelling forfeiture, he called Mr. Borders during a morning recess and left a message that he would be awaiting Mr. Borders' call between 12:00 and 1:00 p.m.

5. Judge Hastings called Mr. Borders four times between the call on May 4 and the scheduled time of sentencing on May 11, 1981 at 1:00 p.m.: once after midnight on May 6 from Madison, New Jersey; once on May 7 at 4:30 p.m. when Judge Hastings left a message for Mr. Borders to call him at 7:00 a.m. the next morning; and twice before 7:00 a.m. on May 11. Two of the calls (on May 7 and May 11) were to the home of Mr. Borders' girlfriend. On May 11, Judge Hastings postponed sentencing. One of the three documented calls lasted less than two minutes; the two others less than one minute each.

6. Judge Hastings sentenced the Romanos on July 8, 1981. On July 5, 7 and 9, Judge Hastings called Mr. Borders. The July 5 and 7 calls each lasted less than one minute. On July 9, Judge Hastings left a message for Mr. Borders. The following weekend Mr. Borders met Judge Hastings in Miami.

7. On September 10, 1981, the same day that Mr. Borders arranged a September 12 meeting with Mr. Rico, there were calls back and forth between Judge Hastings and Mr. Borders. The calls occurred both before and after the Borders-Rico meeting had been arranged.

8. On September 11, 1981, the day before Mr. Borders was to meet Mr. Rico, Judge Hastings called Mr. Borders twice.

9. On September 20 or 21, 1981, Mr. Borders called Judge Hastings which was during the 10 day period before the order was to issue.[7]

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[7] This call is not documented by phone records; however, Judge Hastings testified to the call at trial.

10. On October 2, 1981, after telling Mr. Rico that he would check on the promised order vacating the forfeiture order, Mr. Borders called Judge Hastings' chambers and asked to speak with Judge Hastings.

11. On October 4, 1981, Mr. Borders called Judge Hastings' residence and left a message for the judge to call.[8]

12. On October 5, 1981, Judge Hastings told his law clerk to get the *Romano* order out that day. At 5:12 p.m. that day, Judge Hastings called Mr. Borders.

13. On October 8, 1981, Judge Hastings called Mr. Borders and arranged to stay at the same hotel when he came to Washington, D.C. on October 9, 1981.[9]

6. Pre-trial Proceedings

Following William Borders' arrest on October 9, 1981, a subpoena was served on the chambers of Judge Hastings, seeking appointment calendars, telephone logs, and other records. The requested documents were turned over to the FBI at the time of the service of the subpoena.

William Borders was released from jail on Saturday, October 10, 1981. The items subpoenaed from Mr. Borders' office on October 9, 1981, were turned over on October 13, 1981. At least two items from Mr. Borders' office were missing: a telephone message slip from September 9, 1981 and the secretary's desk calendar for September 1981.

On October 13, 1981, a grand jury began hearing evidence, a process it concluded on October 21, 1981. On December 29, 1981, an indictment was returned against

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[8] This call is also not documented in the phone records; however, Judge Hastings testified to it at trial.

[9] *See* Appendix I to the Subcommittee Hearings at p. 199 n. 47.

Mr. Borders and Judge Hastings charging both with conspiracy and obstruction of justice.[10]

On January 4, 1982, the case was assigned to Judge Edward T. Gignoux, then Chief Judge of the United States District Court for the District of Maine, sitting by designation. He ordered reciprocal discovery, which called for each of the parties to produce for the other side those documents it intended to rely upon at trial. The prosecution produced its documents on January 19, 1982, including the tapes of the intercepted telephone calls between Judge Hastings and Mr. Borders. The defense produced its materials on February 12, 1982. Judge Hastings did not at that time produce any letters or drafts of letters about or to "Hemp" as referred to in the critical October 5, 1981 conversation.

On February 1, 1982 Judge Hastings filed suit to enjoin his prosecution on the ground that a sitting federal judge had to be impeached before a prosecution could proceed. Although this position was eventually rejected,[11] his criminal case was stayed pending the outcome of the litigation, thereby prompting Judge Gignoux to sever Judge Hastings' trial from that of Mr. Borders.

Mr. Borders was tried in Atlanta, Georgia from March 22 until March 29, 1982. Neither Mr. Borders nor Judge Hastings testified. The theory of Mr. Borders' defense was that there was insufficient evidence of a conspiracy with Judge Hastings. Mr. Borders argued that although the evidence may have been compelling that he solicited and took a bribe on behalf of the judge, there was insufficient evidence that he had acted in concert with Judge Hastings.[12] The jury convicted Mr.

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[10] Mr. Borders was also charged with two counts of interstate travel to carry out the bribery scheme.

[11] *United States v. Hastings*, 681 F.2d 706 (11th Cir. 1982).

[12] *United States v. Borders*, 693 F.2d 1318, 1319 (11th Cir. 1982).

Borders on all counts on March 30, 1982. Mr. Borders appealed, contesting the introduction of certain evidence supporting a finding that there was a conspiracy, specifically the evidence tending to show that Judge Hastings had fled Washington, D.C. after he had learned of Mr. Borders' arrest. The United States Court of Appeals for the Eleventh Circuit concluded that the evidence of flight was sufficient to support a finding that Judge Hastings had conspired with William Borders and affirmed the conviction.[13]

Judge Hastings and his attorneys undertook to prepare his defense. In addition to having one of the defense attorneys attend Mr. Borders' trial as an observer, thereby enabling the judge to gain a preview of the Government's evidence against him, the defense team immediately reviewed the taped conversations.

On January 25, 1982, Hemphill Pride was interviewed by Judge Hastings in Columbia, South Carolina. Judge Hastings' principal attorney at that time, Joel Hirschhorn, was concerned about his client meeting alone with Mr. Pride and therefore arranged for a local attorney, Jack Swerling, to attend the session. When the conference concluded, however, Mr. Pride insisted on driving Judge Hastings to the airport. During that trip, Judge Hastings told Mr. Pride it was important for Mr. Pride to recall that the judge was trying to draft support letters for him. When Mr. Pride told the judge that he knew of no such attempts and, if he had, he would have stopped any such efforts, Judge Hastings replied that Mr. Pride would not have had to know about it. Mr. Pride refused to endorse Judge Hastings' suggestion and disavowed any connection with the letters.

Following the Court of Appeals' rejection of his challenge to the prosecution, Judge Hastings' case was set

[13] *Id.*

for trial. Approximately one month before trial, on December 13, 1982, Judge Hastings (now represented only by himself and Patricia Williams) for the first time disclosed to the prosecution the "Hemp letters," which consisted of three yellow legal pad sheets, comprising three handwritten letters, one addressed to Hemphill Pride, and the other two addressed generally to friends and supporters from whom Judge Hastings was requesting either financial assistance for Mr. Pride or letters of support to be sent to the South Carolina Supreme Court, to be used to assist Mr. Pride in gaining readmission to the South Carolina bar.

The prosecution submitted the letters to forensic experts in an attempt to date the creation of the letters. The Committee did so as well. None of the forensic experts, however, could date the papers. The paper and ink employed were such that it was impossible to conclude when the letters were written. Likewise, tests to reveal impressions on the paper other than the visible writing revealed nothing that could date the papers.

B. Judge Hastings' False Testimony at Trial

Judge Hastings' criminal trial, conducted in Miami, Florida, began on January 19, 1983 and continued for 12 days. Judge Hastings took the stand as the final witness in his defense. During his testimony, Judge Hastings testified falsely in 14 different instances. Three instances of false statements pertain directly to Judge Hastings' testimony that he did not participate in a conspiracy with William Borders: (1) Judge Hastings' assertion that he and Mr. Borders did not agree to solicit a bribe from the Romanos; (2) Judge Hastings' assertion that he and Mr. Borders did not agree that Judge Hastings would modify the Romanos' sentences from a prison term to probation in exchange for the bribe; and (3) Judge Hastings' assertion that he and Mr. Borders

had never agreed that Judge Hastings would set aside the May 4, 1981 forfeiture order after a payment on the bribe.

The 11 other instances of false testimony pertain to Judge Hastings' attempt to explain away specific incriminating evidence. Judge Hastings knowingly testified that:

1. He expected to meet William Borders at the Fontainebleau hotel on September 16, 1981.
2. He was surprised by Mr. Borders' arrival at his room at the Sheraton Hotel on September 12, 1981.
3. On October 5, 1981, he told his law clerk to prepare the order in the *Romano* case primarily because the law clerk would be leaving his employment shortly.
4. His October 5, 1981 telephone conversation with William Borders was about writing letters for Hemphill Pride rather than about the conspiracy to solicit a bribe in the *Romano* case.
5. The "Hemp letters" were written on October 5, 1981, when, in fact, they were fabricated by Judge Hastings after that date in an effort to conceal his participation in the bribery scheme.
6. On May 5, 1981 he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.
7. On August 2, 1981 he talked to Hemphill Pride by placing a telephone call to 803-782-9387 in Columbia, South Carolina.
8. On September 2, 1981 he talked to Hemphill Pride by placing a telephone call to 803-758-8825 in Columbia, South Carolina.
9. The telephone number 803-777-7716 was the number at a place where Hemphill Pride could be contacted in July 1981.
10. On the afternoon of October 9, 1981, he called his mother and Patricia Williams from his room at the L'Enfant Plaza Hotel.

11. He took a plane from BWI rather than National because he did not think there were direct flights to Miami from National at that time.

In the Senate of the United States

Sitting as a Court of Impeachment

In re IMPEACHMENT OF JUDGE ALCEE L. HASTINGS

RESPONSE TO MOTION TO DISMISS ARTICLE XVII

Article XVII charges Judge Hastings as follows:

> Judge Hastings, who as a Federal judge is required to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially, did through—
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> (1) a corrupt relationship with William Borders of Washington, D.C.;
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> (2) repeated false testimony under oath at Judge Hastings' criminal trial;
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> (3) fabrication of false documents which were submitted as evidence at his criminal trial; and
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> (4) improper disclosure of confidential information acquired by him as supervisory judge of a wiretap;
>
> undermine confidence in the integrity and impartiality of the judiciary and betray the trust of the people of the United States, thereby bringing disrepute on the Federal courts and the administration of justice by the Federal courts.

Respondent asserts that this Article should be dismissed for two reasons. First, he claims that the article is fatally flawed because it "fails to allege a separate 'high crime or misdemeanor' within the meaning of the

Constitution."[1] Second, he claims that since sections (1) through (3) of the Article restate the accusations found in the first fifteen Articles, they should be stricken for the reasons set forth in his Motion to Dismiss with respect to those articles, leaving only section (4), which, he asserts, should be dismissed as redundant of Article XVI.[2] The response of the Managers to Respondent's second argument is set forth in Managers' Response to Motion to Dismiss Articles I through XV.

With respect to his first contention, Respondent's claims are both factually and legally inaccurate: his description of the substance of Article XVII ignores its important differences from the preceding articles, and his recitation of the Congressional precedents supporting this form of article is erroneous. More importantly, Respondent fails to understand, or even acknowledge, the import of articles of impeachment which do not merely set forth one or more impeachable offenses, but which assert that a course of behavior involving several forms of misconduct has damaged the body politic. Viewed in this context, it becomes apparent why such omnibus articles have been adopted and have formed the basis for all the impeachment convictions in the twentieth century.

In the American experience, a total of only five persons, all of them judges, have been impeached and convicted by the Congress. Three of those men (Judges Archbald (1912–1913), Ritter (1933–1936) and Claiborne (1986)) were tried and convicted on so-called "omnibus" articles of impeachment.[3]

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[1] *Motions to Dismiss Article XVII*, at 98.

[2] *Id.* at 103–04.

[3] Neither of the other two convicted officials, Judge Pickering (1804) and Judge Humphreys (1862) was tried on an omnibus article.

Thus, in every impeachment trial in this century which resulted in conviction, the Senate has convicted on an article that included several acts of misconduct, including acts that were separately alleged in other articles.[4] Respondent's assertion that such precedents "have no real consequences" when the respondent is also found guilty on other articles misses the point, since a conviction on the "omnibus" article is a recognition by the Senate that such a formulation of charges is proper, and that the pattern of behavior alleged therein is a separate basis for removing the official from office.

In the impeachment of Judge Robert W. Archbald, the final article charged generally that as a district court judge, Archbald had used his office "wrongfully to obtain credit," and as commerce court judge, that he had used his office to affect "various and diverse contracts and agreements," in return for which he had received hidden interests in those contracts, agreements and properties. In the preceding articles, these charges had been specified and set forth separately.[5] The Senate found Archbald guilty of the charges in five of the thirteen articles, including the catch-all thirteenth.[6]

With respect to Judge Halsted Ritter, his acts of misconduct were pleaded in the final article of impeach-

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[4] Respondent is mistaken when he asserts that Judge Archbald was acquitted. *See* Motion to Dismiss Article XVII, at 101: "The practice [of exhibiting a culminating article] had no real consequence in the *Archbald* and *Claiborne* impeachments; *Archbald* was acquitted in any event and *Claiborne* was convicted on other counts." In fact, both Judge Archbald and Judge Claiborne were convicted on a "culminating" article as well as other articles. *Congressional Record*, Senate Proceedings, 62d Cong., 3d Sess., January 13, 1913, at 1623–1647 (hereinafter "Archbald Proceedings"); Proceedings of the United States Senate, 99th Cong., 2d Sess., S. Doc. 99–48, at 291–298 (hereinafter "Claiborne Proceedings.")

[5] Archbald Proceedings, *supra*.

[6] *Id.*

ment primarily by cross-reference to the preceding articles. Moreover, the cumulative effect of his conduct was specified:

> . . . the reasonable and probable consequence of the actions or conduct of Halsted Ritter, hereunder specified or indicated in this article, since he became judge of said court, as an individual or as such judge, is to bring his court into scandal and disrepute, to the prejudice of said court and public confidence in the administration of justice therein, and to the prejudice of public respect for and confidence in the Federal judiciary, and to render him unfit to continue to serve as such judge.[7]

Objections similar to those raised in Judge Hastings' Motion to Dismiss were raised by Judge Ritter and rejected by the Senate. First, Ritter argued that the omnibus article should be stricken because the rules of both criminal and civil pleading were violated by combining separate and distinct offenses.[8] Second, Judge Ritter asserted that when the Senate voted on the omnibus article, it would have already voted on the previous articles, and

> . . . it is contemplated that the votes of the Senate upon . . . all the preceding articles, shall be single, definite, and final, and that they shall not be presented again in a massed, cumulative, collective arrangement in the final article . . . Such an arrangement is decidedly unjust to the respondent. The single, separate, and final vote upon the preceding articles should end those articles, and they should not be voted upon again in the final catch-all arrangement of article VII.
>
> The object and purpose of such an arrangement can be but to cumulate adverse votes, if any, upon

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[7] Congressional Record, Senate Proceedings, 74th Cong., 2d Sess., March 31, 1936, at 4655 (hereinafter "Ritter Proceedings.")

[8] *Id.* at 4657.

> prior articles, with the hope that the cumulative or collective arrangement may be sufficient to sustain those articles in the vote upon the final article . . .[9]

The Managers for the House of Representatives argued that neither criminal nor civil rules of pleading applied, and, more importantly, that the omnibus article was a separate charge in that it alleged a course of behavior more damaging than individual acts of misconduct. The article, it was argued, raised

> . . . a substantial doubt as to [Judge Ritter's] judicial integrity . . . . We contend that this is the highest crime which a judge can commit on the bench. *It is not whether he did this thing, that thing, or the other thing, but whether or not the sum total of the things he has done has made the people doubt his integrity as a judicial officer.* (emphasis added) [10]

The Senate acquitted Judge Ritter on each of the first six articles, but found him guilty only of the omnibus article. A point of order was raised that the conviction was improper because of the acquittal on the substantive charges of the preceding articles. The point of order was overruled by the Chair, the Chair stating, "A point of order is made as to Article VII in which Respondent is charged with general misbehavior. It is a separate charge from any other charge." [11]

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[9] *Id.* at 4658.

[10] *Id.*

[11] Ritter Proceedings, *supra,* at 637–38.

An analysis of the actual votes on the Ritter Articles of Impeachment does not support Respondent's claim here that a "culminating article," as he terms it, permitted an accumulation of guilty votes in that case. Respondent claims that Judge Ritter was convicted on the omnibus article because the "votes of those who thought him guilty of one or more were permitted to cumulate in

Continued

In the same sense, Article XVII herein is a charge separate and distinct from the preceding articles. Indeed, in the present proceeding, an even stronger case can be made that the omnibus article is a separate charge. Although it generally pertains to conduct that is also alleged in the preceding articles, Article XVII does not merely refer to those articles, but sets forth specific conduct which has undermined confidence in the Federal judiciary.

This recitation of conduct in Article XVII differs in several respects from that described in the previous articles. Section (1) would require only a finding of a corrupt relationship with William Borders, without necessarily making findings with respect to the details set forth in the preceding articles. Likewise, section (2) refers generally to "repeated false testimony." Section (3), relating to the charge that Respondent fabricated false documents is not set forth in the previous articles. Section (4), alleging improper disclosure of confidential information, describes impeachable conduct without the detail set forth in Article XVI.

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the seventh. . . ." In fact, the vote to convict Judge Ritter on the final Article of Impeachment was only one vote greater than that on the first article, and a total of only three votes changed from the vote on the first article: one Senator who had voted not guilty on all the other articles voted to convict on this article, and two other Senators reversed their votes from the first article. Thus, there was no "cumulation" of guilty votes from other articles.

Likewise, the voting record in the Archbald and Claiborne impeachments shows no evidence of actual cumulation of guilty votes. Archbald and Claiborne Proceedings, *supra*.

Whatever the actual voting history in a particular impeachment, however, the fact remains that Article XVII in this case is not a mere repetition of the previous articles. Rather, conviction on the omnibus article reflects a determination that two-thirds of the Senate finds that Respondent's pattern of conduct constitutes "general misbehavior" which justifies removal from office.

The "omnibus" article further states that this conduct violated Respondent's responsibility as a Federal judge "to enforce and obey the Constitution and laws of the United States, to uphold the integrity of the judiciary, to avoid impropriety and the appearance of impropriety, and to perform the duties of his office impartially. . . ." This special duty and standard of Federal judges is at the heart of the omnibus article. In explaining the purpose of such an article in the Claiborne case, Manager Peter Rodino stated:

> . . . The allegations of article IV rest on the same evidence adduced in support of articles I, II, and III.
>
> . . . Conviction on article IV, however, rests on a separate and compelling legal theory, which has roots deeply embedded in the impeachment power. In 1936, the Senate convicted Judge Halsted L. Ritter of bringing disrepute upon the Federal judiciary that he had been chosen to represent.
>
> * * * * *
>
> As Members of this body have recognized in prior judicial impeachments, the judges of our Federal courts occupy a unique position of trust and responsibility in our system of government: They are the only members of any branch who hold their office for life; they are purposely insulated from the immediate pressures and shifting currents of the body politic. But with this special prerogative of judicial independence comes the most exacting standard of public and private conduct.[12]

As in previous impeachments resulting in conviction, the final article in this case alleges general misconduct resulting in the undermining of the Federal judiciary. Although in the instant case, each act of misconduct in-

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[12] Claiborne Proceedings, *supra* at 122.

dividually constitutes reprehensible behavior totally at odds with continued service as a Federal judge, the gravamen of Article XVII is that the sum total of the individual acts is destructive to the judiciary. History attests to the fact that a pattern of misconduct is a separate basis for conviction and removal from office.

Accordingly, for the reasons set forth above, and in the Managers' Response to Respondent's Motion to Dismiss Articles I through XV, the Managers of the House of Representatives respectfully request that the Motion to Dismiss Article XVII be rejected.

Respectfully submitted,

THE UNITED STATES
HOUSE OF REPRESENTATIVES
By ALAN I. BARON
Special Counsel to the House Managers.

Managers of the House of Representatives: Jack Brooks, John Conyers, Jr., Mike Synar, John Bryant, Hamilton Fish, Jr., George W. Gekas.

Impeachment Trial Staff: Alan I. Baron, Special Counsel, Janice E. Cooper, Assistant Special Counsel, Patricia Wynn, Assistant Special Counsel, Lori E. Fields, Assistant Special Counsel.

House Judiciary Committee Staff Participating in Impeachment Trial Preparation: William M. Jones, General Counsel, Alan F. Coffey, Jr., Chief Associate Counsel, Daniel M. Freeman, Counsel, Peter Levinson, Associate Counsel, Raymond V. Smietanka, Associate Counsel.

FEBRUARY 24, 1989.

In the Senate of the United States

Sitting for the Trial of an Impeachment

THE HOUSE OF REPRESENTATIVES, OF THE UNITED STATES, PLAINTIFF,

v.

THE HONORABLE ALCEE L. HASTINGS, A JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, RESPONDENT.

JUDGE HASTINGS'S REPLY TO THE RESPONSES OF THE HOUSE OF REPRESENTATIVES TO RESPONDENT'S MOTIONS TO DISMISS ARTICLES I THROUGH XV AND ARTICLE XVII

The House asks the Senate to conduct a trial in this case that would be without precedent in this or any nation in the common law world. Never has impeachment been used to re-examine issues that had been determined by a jury in favor of the accused. We submit that the House's unprecedented request is unjust and unjustified. We ask that the Senate reject it.

Seven years ago, the government accused the respondent of conspiring to solicit a bribe. The government, not the respondent, chose the forum where the accusation would be tried. The government, not the respondent, decided what portions of the available evidence should be

presented to persuade the jury of respondent's guilt. Respondent confronted the government and its evidence in the forum chosen by his accusers. Respondent took the stand. He testified, and he was cross-examined fully.

The government claimed that respondent's testimony was false and produced so much additional evidence as it thought bore upon that point. The government submitted its accusations to the jurors. Respondent, as required, committed his honor and fate to their discretion. Respondent prevailed. The jury rejected the accusations decisively.[1]

Six years after the fact, the House asks the Senate to hold that those proceedings counted for nought. The House says the Senate should not be concerned because there is no difference between an acquittal and a conviction. We say the House is wrong. The House says the Senate should not give weight or deference to the jury's verdict. We say the House is wrong. The House says the

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[1] As one juror recalled it, it was not even close:

> We came to a decision, and we were a very good jury. We were sequestered. We did not have anything to do, except think about this case. . . . We did everything by the book. . . .
>
> [W]e did, kind of, pick over his [the judge's] testimony quite a lot. . . . [I]f you can catch somebody in one lie, you can assume they are lying through the whole thing. We picked it apart, and we could not find anything that proved to us. . . . And we finally came to the conclusion that this was not enough evidence to convict anybody of anything. . . .
>
> I mean, we are not even talking reasonable doubt, we are talking a lot of doubt. . . .
>
> [The government's case was] [c]ircumstantial evidence that was shaky at best and an investigation that did not finish. . . .

S. Rep. No. 101–1, 101st Cong., 1st Sess. 139–41 (1989) (transcript of video presentation submitted to Committee on Rules and Administration including views of Ms. Debi McMullen, one of the original jurors).

Senate should not consider facts such as the death of witnesses or the destruction of records and memories in deciding whether it can conduct a trial that is fair to the respondent. We say the House is wrong. The House says it should not matter that the government has expended more than two million dollars in re-examining the evidence against the accused without providing any money to enable the respondent to gather or preserve evidence for his defense. We say the House is wrong. The House says it should not matter that six years of post-acquittal investigations produced no evidence that was not available to the prosecutors at the first trial. We say the House is wrong.

We say the House is wrong in principle. We say the Senate should be concerned, very much concerned. We say the Senate should rebuff the House's unprecedented attempt to impeach a jury's verdict of acquittal and impose the burdens of a second trial on the Senate and the respondent six years after the fact in the circumstances present here. We submit this reply so the Senate may fully appreciate the wrongness of the views the House presses upon it.

A.

The Senate must resolve two questions:

1. What deference should the Senate give the jury's verdict acquitting the respondent of the accusations realleged in the challenged articles of impeachment?

2. Is it feasible, at this late date, that a trial on the merits could satisfy the essential requirements of fairness to the respondent?

The House contends that there is no difference between an acquittal and a conviction and that the Constitution requires that the Senate give little or no weight to the jury's verdict rejecting the accusations it renews

here. Respondent contends that a final determination made by a constitutional body in a coordinate branch of government is entitled to great deference by officers in all three branches. In this view, the Senate can properly decline to assume the burden of redetermining issues that have been determined by a jury *in favor of the accused*, and the Senate should invariably decline that burden unless confronted with subsequently discovered "smoking gun" evidence or other comparably exceptional circumstances. We submit that, if there are circumstances that might justify the Senate's undertaking such a second trial, they are not present in this case.

The House contends that the Senate may not properly consider whether the passage of time has created a situation that may make it impracticable and probably impossible for the Senate to conduct a second trial on the merits that comports with the requirements of fundamental fairness. In our view, this must be wrong. The Senate can and must consider the general requirements of fundamental fairness the Constitution established to protect the rights of all accused citizens. We submit that the passage of time has created circumstances in which it is no longer feasible for the Senate to conduct a trial that comports with those requirements in this case. Too many witnesses have died and too many records have been destroyed. What remains is only the testimony of witnesses whose testimony has been too often rehearsed or witnesses whose recollection must necessarily have dimmed beyond repair.

The House does not indicate what weight, if any, the Senate should give the special requirements of secure tenure and compensation that the Constitution established to protect the necessary independence of every judge appointed to exercise the federal judicial power. In our view, that is an omission the Senate may not properly overlook. That omission bears upon the

House's further contention that the Senate would establish a troubling precedent if it granted these motions to dismiss. That contention ignores the fact that the questions presented by these motions are related. In our view, the fact that the accused is an Article III judge and the combination of extraordinary circumstances present in this case make it clear that the Senate may properly dismiss these articles without any concern that the precedent established would restrict the House in bringing proper cases of impeachment in the future.

The circumstances that support this view are far more extensive than the House has acknowledged. It is not just the fact that a jury rejected the accusations the House asks the Senate to retry. It is also the fact (i) that there is no new evidence that was not available to the prosecutors at the time of trial, (ii) that the House's case remains today as the prosecutor's case was then—circumstantial, and (iii) that a second trial would merely afford the House a chance to second-guess the strategy the prosecutors adopted and required the respondent to confront before the jury. It is not just the fact that more than seven years have passed since the principal accusation was first made and more than six since the challenged accusations were rejected by a jury. It is also the fact that witnesses have died, records have been lost and destroyed, and recollections have become impaired or diminished beyond repair. It is not just the fact that the six years of post-acquittal investigations have undermined the security and diminished the compensation of the respondent. It is also the fact that his accusers have enjoyed substantially unlimited resources to pursue their post-acquittal investigations while no resources have been made available to enable the judge to pursue the additional post-acquittal investigations that would have been necessary to enable him

to gather and preserve the additional evidence necessary for a fair defense.

We submit that the Senate should dismiss the challenged articles to assure that these circumstances can never again come before it in a case of impeachment. The precedent established would be narrow and healthy and would not prevent the House from initiating and the Senate from considering any case in which the circumstances warranted a determination on the merits.

B.

The tortured analysis of the framers' intent and contemporary constitutional doctrine developed by the House ignores the basic plan the framers intended and the subsequent developments that have made it necessary for the Senate to decide the questions presented here. The founding fathers clearly did not envisage that judges might be criminally prosecuted by the executive and tried in the courts *before* they had been impeached by the House and tried by the Senate. The Constitution and its history clearly support the view that the framers saw impeachment proceedings as being, in most important respects, criminal in nature. For that reason, the framers included explicit exceptions to accommodate the differences in procedure they foresaw as necessary.

They foresaw the potential need for and explicity provided an exception that authorized a second trial before the courts on accusations that had resulted in a *conviction* by the Senate. By implication, they excluded the possibility of a second prosecution and trial before the courts after an *acquittal* by the Senate in a case of impeachment. Indeed, could anyone seriously contend that a judge who had been acquitted by the Senate would remain liable to prosecution by the executive and trial

by the courts on the very accusations that the Senate had rejected?

The framers did not envisage the day when the judicial business would require the service of more than 700 federal judges. This unanticipated circumstance has established the conditions under which criminal prosecution by the executive and trial before the courts have been permitted to *precede* impeachment by the House and trial before the Senate. That development has undermined, in some degree, the protections accorded judges. Far from warranting further departures from the principles the framers established, however, that development has enhanced the need for their careful application.

The sequence of the proceedings should not affect the principles or their application. A *conviction* in either forum justifies and may require a second trial in the other. It was necessary that the Senate independently re-examine the accusations and evidence after Judge Claiborne had been tried and convicted in the courts in order to provide him with the *protections* the framers intended when they authorized a *second trial* for those *convicted* in cases of impeachment. Moreover, the circumstances that have led to the adoption of a sequence that differs from that envisaged by the framers has enhanced the need for independent examination by the House and the Senate to assure that executive and judicial officers have not exercised their discretionary powers improperly to undermine the security of a disfavored judge. It is also clear that both the House and Senate accorded the jury's verdict considerable weight in the *Claiborne* impeachment.

An *acquittal* in either forum is entitled great respect in the other, and the Senate should accord a judgment of acquittal in the courts the same deference it would expect the courts to accord a judgment of acquittal by

the Senate. It is a grave matter to go behind the verdict of a jury. It undermines the constitutional position of the jury in our system of government. It violates, in our view, and undermines, in any view, fundamental protections guaranteed every accused under our constitutional plan. When the accused is a judge, it undermines the protections conferred to assure the people an independent judiciary. The Senate may leave for another day a determination whether there are any circumstances that would justify the Senate in taking such a course, for surely there are no circumstances that would warrant such a departure from established principle in this case.[2]

C.

The House's analysis also fails to take account of the changed situation that the Senate must confront. The

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[2] The House does not suggest that any principled distinction may be drawn to save its false testimony accusations from dismissal, if principle precludes a second trial, and it is clear that there is no basis for such a distinction. The federal courts have long recognized that the principle of collateral estoppel bars the government from reprosecuting an individual for perjury where the charge merely alleges that the testimony given at a prior trial denying his guilt of the substantive offense was false. *See United States v. Butler,* 38 F. 498 (E.D. Mich. 1889); *Chitwood v. United States,* 178 F. 442 (8th Cir. 1919); *Allen v. United States,* 194 F. 664 (4th Cir. 1912); *Ehrlich v. United States,* 145 F.2d 693 (5th Cir. 1944). The Supreme Court has determined that this principle is so fundamental a corollary to the general prohibition against a second trial that it is a constitutional requirement mandated by the due process clause. *Ashe v. Sevenson,* 397 U.S. 436 (1970). The more recent federal decisions on the point have gone further, noting expressly that "the institution of perjury charges against [a defendant] after he had been acquitted of the initial charges" presents " 'a realistic likelihood of vindictiveness.' " *United States v. Eddy,* 737 F.2d 564, 571 (6th Cir. 1984), *quoting United States v. Andrews,* 633 F.2d 449, 453 (6th Cir. 1980) (*en banc*), *cert. denied,* 450 U.S. 927 (1981).

fact that criminal prosecutions by the executive and trials by the court have been permitted to precede impeachment by the House and trial by the Senate reflects a further point. The Senate can no longer devote the time necessary to conduct extended trials with all the guarantees and procedures necessary to assure that the trial is fair to the accused and that the Senate can "preserve unawed and uninfluenced the necessary impartiality between an *individual* accused and the *representatives of the people, his accusers.*" [3]

The present case of impeachment illustrates the problems in their most extreme form. It required the undivided and undistracted attention of a judge and twelve jurors for more than two weeks for the trial that was necessary to enable the prosecutors to present so much of the available evidence as they thought necessary and to enable the accused to respond. The House now estimates that it would take twelve to fifteen *full* trial days just for it to re-present that evidence and such additional evidence as it believes material to the case. Counsel for the accused have estimated that time needed for response cannot be less. If the House inquiry is any guide, the documents submitted will be voluminous.

This is not the kind of enterprise which the Senate should encourage or undertake, absent compelling necessity. Where a jury has unanimously rejected accusations against a judge following a trial that afforded his accusers a full and fair opportunity to present so much of the available evidence as they thought bore upon his guilt, the House should be neither encouraged nor permitted to impose the burdens of a belated second trial on the Senate merely to permit it to have a second chance to see if a more extensive presentation of the

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[3] *The Federalist No. 65* at 441 (Hamilton) (Cook ed. 1961) (emphasis in original).

same evidence might be marshalled to produce a different result.[4]

The plan envisaged by the framers has been altered to accommodate the necessities of the present situation. The executive has, *de facto*, assumed in large measure the House's role of investigating and prosecuting accusations charging a judge with serious offenses. The courts and juries have been, *de facto*, substituted for the Senate as the adjudicators of a judge's innocence or guilt. Congress has assigned the judiciary the powers necessary to enable it to inquire into lesser charges of misconduct and to investigate and bring to the House's attention serious allegations that the executive may have overlooked or may have determined did not constitute offenses under the criminal laws.

Under this altered plan, the Senate retains an important role that still must tax its capacity. The Senate must conduct the second trial contemplated by the Constitution for judges who are *convicted* in the courts. That trial must be sufficient to enable the Senate to satisfy itself that the judge was not improperly abused in the process. The Senate may yet have to conduct full trials on accusations certified to the House by the judiciary or developed by the House itself that have not previously been submitted to the courts.

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[4] The House's claim that separation of powers analysis justifies such a second trial is also flawed. The present case pits the powers of the government against an accused individual. The individual's protection against governmental over-reaching comes from the principles embodied in due process. Under those principles, the test that determines whether a second prosecution and trial are precluded is whether the second attempt is made by the "same sovereign" that initiated the first. The fact that the second proceeding is initiated by a different department or agency of that sovereign does not avoid the bar. *See, e.g., Waller v. Florida, 397 U.S.* 387 (1970).

The procedures available today establish precautions greater than those contemplated by the framers to assure the responsibility of federal judges. Neither principle nor contemporary need provide any support for the further departure the House seeks in this case of impeachment. Nor do they support the House's view that the Senate should assume burdens greater than those it must execute to serve its intended function.

Principle and common sense suggest that the better practice would be to require that the judiciary, the executive, or the House find other accusations if they believe an acquitted judge has corrupted his office and should be removed. The House has produced one such new accusation in this case, the improper disclosure accusation made in Article XVI.[5] That accusation should suffice to provide it the opportunity it seeks. That accusation, but only that accusation, may properly be tried on the merits, if the House persists in the view that the evidence warrants such further proceedings.

D.

The arguments advanced by the House rest upon a fundamental misconception of the nature of the proceedings. The House contends that the framers intended impeachment proccedings to be purely remedial with *none* of the characteristics of cases that are criminal in nature. The House's arguments ignore the plain meaning of the language and other established principles of construction. The point is adequately developed in our opening memorandum; the flaws in the House's re-

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[5] The judge has instructed counsel not to challenge that article, for he agrees that a judge who made disclosures such as those alleged should be removed from office, notwithstanding the Justice Department's and his own counsels' doubts that the accusations properly allege an offense.

sponse may be illustrated here by considering six questions it left unsatisfactorily answered:

1. If the framers intended to create merely a remedial process for the removal of public officers, why did they adopt the label "impeachment," a label that only applied to cases that were viewed as criminal in nature?

2. Why did the framers reject proposals that the standard include "maladministration" and "neglect of duty" and borrow instead the English criminal standard for defining offenses against the state, "Treason, Bribery, and other high Crimes and Misdemeanors," if they intended to establish a remedial proceeding that was not to have any of the attributes of proceedings that were criminal in nature?

3. Why did the framers include the exception to the general rule, "the Trial of all Crimes, except in cases of impeachment, shall be by the jury," unless they understood that the general rule would apply to cases of impeachment as well as to other criminal cases in the absence of an exception?

4. If impeachment is merely a remedial proceeding to remove an unfit officer from office, why did the framers confer upon the Senate the discretion to impose the additional sanction of "disqualification to hold and enjoy any Office of honor, Trust, or Profit under the United States"—as Hamilton saw it, the "awful discretion . . . to doom . . . to infamy" and the power to sentence the offender "to a perpetual ostracism from the esteem and confidence and honors and enrichments of his country"?

5. If the cases of impeachment were not to be criminal in nature and the sanction of permanent disqualification was not intended as punishment, why did the framers find it necessary to include an

express exception to the power that authorizes the President "to grant Reprieves and Pardons for offenses against the United States, except in cases of impeachment"?

6. If cases of impeachment were not to be criminal in nature, why did the framers conclude that an express exception to the general rule was necessary to assure that a "Party *convicted* [in a case of impeachment] shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"?

The extraordinary nature of the premise the House asks the Senate to accept is also apparent in contemporary practice. For example, where should a lawyer, a judge, or a Senator look for an authoritative definition of a legal term? For almost 100 years, the nigh universal answer has been *Black's Law Dictionary.* Throughout that period, the definition of "impeachment" has remained essentially unchanged:

> *Impeachment.* A criminal proceeding against a public officer, before a *quasi* political court, instituted by a written accusation called "articles of impeachment"; for example, a written accusation by the House of Representatives of the United States to the Senate of the United States against the President, Vice President, or an officer of the United States. Such federal power of impeachment is provided for in Art. II, § 4 of the Constitution. Under Art. I, § 2, cl. 5, the House of Representatives "shall have the sole Power of Impeachment", and under § 3, cl. 6, "The Senate shall have the sole Power to try all Impeachments".
>
> *Articles of impeachment.* The formal written allegation of the causes for an impeachment, an-

swering the same purpose as an indictment in an ordinary criminal proceeding.[6]

The House concedes that in 1787, "impeachment," as a term describing the procedure for the trial of a public officer, had only one meaning. It does not, however, explain the alchemy by which it contends that the plain meaning of that term was transformed in the minds of the framers or why this transformation has passed unnoticed by those responsible for recording such matters.[7]

This flawed premise has led the House to claim here powers that are truly unprecedented. Never in the history of the common law nations has a constitutionally tenured judge been impeached on accusations after he had been tried and acquitted on the same accusations in

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[6] *Black's Law Dictionary* 678 (rev. 5th ed. 1979); *compare* "impeachment," *Black's Law Dictionary* 593 (1891) (first edition).

[7] The contemporary commentary upon which the House relies was provoked by a different concern. The central issue concerned the scope of conduct that may properly be included in the standard, "Treason, Bribery, or other high crimes and Misdemeanors." That literature and prior practice has established that the standard permits conviction and punishment by the Senate for offenses against the state that are not offenses under federal statute. The framers understood that the breadth of the Senate's power would necessarily deny the accused the protections against *ex post facto* laws and bills of attainder that would be available in ordinary criminal cases. That was the principal justification for limiting the Senate's jurisdiction and the extent of the punishment it might impose. *See The Federalist No. 84* at 575–76 (Hamilton).

That literature has no proper application in the context presented by this case. The framers recognized that impeachments were an extraordinary form of criminal jurisprudence in which the accused must necessarily be deprived of some of the protections enjoyed by those called to account in ordinary criminal cases before the court. They considered and specified the exceptions. By so doing they confirmed the applicability of the general rule and of those protections for which they did not specify exceptions.

a court of law. Indeed, in the only significant modern precedent, the proceedings against Associate Justice Lionel Murphy of the High Court of Australia, the statute authorizing the impeachment inquiry prohibited any further inquiry into the accusations on which Justice Murphy had been criminally tried and acquitted in the courts.[8] That the principle has been observed for almost 300 years without departure should caution the Senate from breaking with that tradition here.

E.

The House does not suggest what protections, if any, must be accorded a respondent in a case of impeachment. This seeming disdain for the rights of the accused also stems from its flawed view that such cases are merely remedial proceedings in which the rights of the accused are matters of small moment. In this, the House must be wrong. Whatever the full scope of the specific protections required, the fact that the proceedings are, in important respects, criminal in nature and that they threaten the accused with loss of fundamental rights establishes that the basic protections mandated

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[8] *See* Parliamentary Commission of Inquiry Act of 1986, Austl. Acts. P. No. 9 of 1986. Section 5(4) of that act provided:

> (4) The Commission [established to conduct the inquiry] *shall not consider*—
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> (a) the issues dealt with in the trials leading to the *acquittal* of the Honorable Lionel Keith Murphy of certain criminal charges on 5 July 1985 and 28 April 1986 and, *in particular*, the issue of the Honorable Lionel Keith Murphy's guilt or innocence of those charges; or
>
> (b) whether the conduct to which those charges related was such as to constitute proved misbehavior within the meaning of section 72 of the Constitution,
>
> except to the extent that the Commission considers necessary for the proper examination of other issues arising in the course of the Commission's inquiry.

Emphasis supplied.

by the due process clause must be fully and strictly observed in cases of impeachment.[9]

The House's failure to recognize the extent to which due process requirements must be observed in cases of impeachment extends to its defense of Article XVII. The framers rejected joint address as a method of removal. They insisted instead that the House plead and prove specific offenses. Article XVII does not satisfy the standard prescribed or the requirements of due process. It is too late in the constitutional day to claim that the standards of fairness that must be observed in proceedings such as these permit the accumulation of multiple accusations in a single article in a manner that deprives the accused of the right to avoid conviction unless two-thirds of the Senators join in concluding he is guilty of the same offense.

The Senate tacitly recognized the unfairness in the *Ritter* case, after it was too late to reconsider the issue. The issue is again before the Senate in this case in a far more extreme form. Unless restrained here, there will be nothing to prevent the House from presenting multiple trivial grievances as separate articles in the expectation that the very quantity of the accusations will persuade two-thirds of the Senators to agree to a "catch-all" conviction on the ground that somewhere behind

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[9] In the views of one constitutional scholar, which were provided at the request of the House subcommittee responsible for the inquiry, the nature of cases of impeachment required the application of due process principles which, in and of themselves, would require that the challenged articles be dismissed. *See* "Specific Proffer Regarding Fundamental Fairness Questions" (expressing the views of Professor Thomas G. Krattenmaker of the Georgetown University Law Center), *reproduced as* Addendum B to *Memorandum in Support of Motion to Dismiss Articles I Through XV Without Trial Based Upon 1983 Jury Verdict and Lapse of Time.*

all that smoke there must be some fire. That is neither fair nor sound practice.

F.

The Senate should dismiss Articles I through XV and Article XVII. The result will be therapeutic. It will end the seven-year ordeal of Judge Hastings, an ordeal that should have ended at least six years ago. The remaining article will afford the House a fair opportunity to persuade the Senate, if the House elects to pursue the matter. The burdens that such a trial would impose upon the Senate and Judge Hastings will have been reduced to manageable proportions.

The result will also be therapeutic for the future. The Senate cannot try cases such as the one the House seeks to present here. In all probability, the Senate should no longer serve as the forum in which federal judges are tried. But unless and until the Constitution is amended, it must execute that function in a manner consistent with the constitutional plan. We submit that plan does not require or permit what the House seeks to achieve here. The House and officials in the executive and judicial branches should be so advised. The message should be sent now. The motions should be granted.

Respectfully submitted,

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